THE

AMERICAN

Law Journal and Miscellany.

No. III.

Supreme Court of the United States.

FEBRUARY TERM, 1808.

Peisch et al. *v.* Ware et al. and The United States *v.* the Cargo of the Ship Favourite.

FORFEITURE. WRECK. COLLECTION OF DUTIES. SALVAGE. The section of the act of congress for the collection of duties,* which creates a forfeiture of goods not marked nor accompanied by certificates does not comprehend wrecked goods, nor those found on board of a vessel deserted by her crew, and in such a situation as to render it necessary to land them on the nearest accessible part of the coast. Nor will the landing of goods under such circumstances without a permit subject them to forfeiture, because a forfeiture can only be applied to cases in which the means that are prescribed for the prevention of a forfeiture may be employed.† The same rule applies to the removal of the goods from the wharf after they are landed.‡

MARSHALL C. J. In these causes two questions are to be decided by the court.

1st. Is the cargo of the ship *Favourite* or any part of it forfeited to the *United States?*

2d. Are *Ware* and others entitled to any, and if to any, to what salvage?

* [Act of 2d *March* 1799. 4 *L. U. S.* 279. *Vide* sect. 43.]
† [Sect. 51.] ‡ [Sect. 52.]

The first count in the first libel filed on the part of the *United States* claims the brandies, wines and teas therein mentioned, in consequence of their being found in the possession of certain persons therein named, unaccompanied with such marks and certificates as are required by law, the duties thereon not having been paid or secured to be paid.

The second count claims them as forfeited, because they were removed without the consent of the collector, before the quality and quantity of the said wines and spirits, and duties on the said teas were ascertained according to law, the duties thereon not having been paid or secured.

The third count claims them because they were found concealed, the duties not having been paid or secured according to law.

The second libel claims certain other goods which were parcel of the cargo of the *Favourite* as forfeited by being found unlawfully concealed, the duties thereon not having been paid or secured.

The facts of the case are these: The ship *Favourite*, belonging to Mr. *Peisch* of *Philadelphia*, was discovered about the last of *October* adrift in the bay of *Delaware*, deserted by her captain and crew, with her masts gone by the board and without anchor, cables or rudder, and in danger of being carried out to sea. A company was formed to save the vessel and cargo. With considerable labour, in the course of several days, the cargo was unladen and landed at *Lewis*, a small town on the bay, not a port of delivery, where it was with the approbation of the collector left under the care and in the custody of a revenue officer residing at that place, who was one of the party that had originally taken possession of the vessel, and under whose direction the whole business had been in a great measure conducted. On the third of *November*, while the salvors were unlading the vessel and landing the cargo, an imperfect entry was made by the owners or consignees, after which an award was made between the owners and salvors, by which the salvors were allowed one half the cargo. The owners were dissatisfied with this award and refused to acquiesce in

it. The collector ordered the goods, which had been in the custody of a revenue officer, to be carried to *Wilmington*, for the purpose of ascertaining the amount of duties. The salvors objected to this and requested that the duties might be ascertained at *Lewis*, offering at the same time to pay the duties on the moiety of the cargo claimed by them under the award. The collector persisting in his determination to remove the goods to *Wilmington*, the salvors sued out a writ of replevin from the state court, and by force of that writ took the goods out of the possession of the revenue officer. This act is the foundation of the forfeiture alleged in the libels.

The forfeiture said to be occasioned by the goods being found without the marks and certificates required by law depends on the 43d section of the act for collecting duties, and on other sections of the same act which are explanatory of the 43d section. The particular clause giving the forfeiture is in these words, " and if any casks, chests, vessels or cases containing distilled spirits, wines or teas, which *by the foregoing provisions* ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture." The law then authorizes a seizure and subjects such distilled spirits, &c. to forfeiture, unless it be proved at the trial that they were imported according to law, and that the duties were paid or secured.

The objects of this clause are those vessels only, which *by the foregoing provisions* ought to be marked and accompanied with certificates. To determine its extent the "*foregoing provisions*" must be looked into.

The subject is first taken up in the 37th section of the act. That section directs particular and additional entries to be made of distilled spirits, wines and teas, which provisions are adapted to regular importation, not to those articles when saved from a wreck.

The entry is to be made by the importer or consignee, and specifications are required which can only be given by the

owner or consignee, when in possession of the papers relative to the vessel and cargo. If a vessel be wrecked on the coast, the cargo must be lost or brought on shore without the knowledge of the owner or consignee, so as to put it in his power to make the entry; and the salvors are not only not the persons designated by the law to make, but they will often not possess the information which would enable them to make it.

The act proceeds to require that this entry shall be transmitted to the surveyor of the port, where the delivery of the cargo is to commence, to whom also every permit for unlading or landing any part of the cargo must be previously produced, who shall record the same and indorse thereon the word "*inspected*," the time when and his own name. Goods landed previous to these formalities are to be forfeited.

These regulations obviously respect a regular importation, where all these prerequisites to landing may be performed; not cases where a landing must take place without them. To suppose them applicable to salvage goods, would be to suppose that the legislature designed to prohibit salvage entirely, and to forfeit the cargoes of all vessels which might be wrecked on the coast.

The 38th section requires that all distilled spirits, wines and teas shall be landed under the inspection of the surveyor or other officer acting as inspector of the revenue for the port, and therefore, can relate only to cases of regular importation, at a port of delivery where the revenue officer may superintend the landing. He is directed to attend at all reasonable times, not at all places.

The 39th section prescribes the duty of the officer of inspection of the port where the spirits, &c. may be landed. He is to ascertain the duties and mark the casks.

The 40th section directs the surveyor or chief officer of inspection of the port or district in which the *said* spirits, wines or teas shall be landed to give the proprietor, importer or consignee a general certificate; and the 41st section directs him to give a particular certificate for each vessel, which certificate passes with the vessel to the purchaser.

These sections are connected with those which precede them, and relate to regular importations where the spirits, &c. are landed under a permit at a port of delivery, and there is a proprietor, importer or consignee or agent to whom the certificates may be granted; not to spirits, &c. which may from the nature of things lawfully get into the possession of individuals without the knowledge of a revenue officer.

The 42d section only directs that blank certificates shall be provided. These are the sections which precede that which is supposed to give the forfeiture claimed under this count of the libel. The first part of the 43d section directs the proprietor, importer or consignee, who may receive the said certificates, to deliver them with the vessel to the purchaser; and then comes the clause which subjects to forfeiture all vessels containing spirits, &c. which may be found unmarked and not accompanied by certificates, which by the *foregoing provisions* ought to be marked and accompanied by certificates.

In the foregoing provisions the legislature, in the opinion of this court, did not intend to comprehend wrecked goods, nor goods found under circumstances like those in the *Favourite*, where the vessel was deserted by her crew, and where it might be necessary for the preservation of the goods to take them to the nearest accessible part of the coast. Either these spirits, wines and teas would have been liable to forfeiture, if brought to land under the most pressing circumstances, where inevitable loss must attend any delay if a revenue officer should not be present to take possession of them, or the single circumstance of their being found unmarked and unaccompanied with certificates is not in itself sufficient to forfeit them. The opinion of the court, that it was not the intention of the legislature to subject goods under such circumstances to forfeiture, is not formed exclusively on the extreme severity of such a regulation. It is formed also on what is deemed a fair construction of the language of the several sections of the law, which seems not adapted to cases like the present.

The second count in the libel claims the goods as forfeited, because they were, without the consent of the proper officer,

removed from the place where they were deposited, before the amount of duties was ascertained, the duties at that time not being paid or secured. Neither this count nor the first supposes any forfeiture to have been incurred by the landing of the goods or the unlading of the vessel. The spirits, wines and teas are presumed to have been legally brought on shore, and it is the removal only which gives title to the United States. The court therefore is to inquire, whether these goods were under such circumstances that a removal, such as has taken place in this case, will produce a forfeiture. This depends on the 51st section of the law, in expounding which it becomes proper to notice the 50th section also. This section prohibits the unlading of any vessel or the landing of any goods without a permit granted by the proper officers, and subjects the master or other persons having the command of such vessel, and all those who shall be concerned in unlading, removing or storing such goods to heavy penalties, and the goods themselves to forfeiture.

It was well observed, that the application of this section to cases where the goods must perish if not immediately brought on shore, and to cases in which a permit cannot regularly be granted, would be, not only to prohibit, but to punish every attempt to save a cargo about to be lost on the coast. This construction of the law could only be made where the words would admit of no other. But it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means prescribed to save the forfeiture, given in the 50th section, cannot be employed where a vessel is deserted by her crew, or cannot be brought into port. The permit cannot be obtained, nor can those steps which must precede the attainment of a permit be taken. Upon just legal construction then, the landing of these goods without a permit did not subject them to the forfeiture of the 50th section. This act is not within the law. The 50th section is calculated for cases in which the general requisites of the law

can be complied with, not for salvage goods, in cases where those general requisites cannot be complied with.

The 52d section relates to the removal of goods from the wharf or place on which they may have been landed, in conformity with the directions of the 50th section. It presupposes a permit, and that they were landed under the inspection of a revenue officer, in the manner prescribed by the 38th section. It presupposes a case in which the gauging and marking may be done and other means prescribed for the ascertainment of duties and security of the revenue may be taken at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted without extreme peril to remain at the place of landing until these measures should be taken.

The court is also of opinion that the removal, for which the act punishes the owner with a forfeiture of the goods, must be made with his consent or connivance or with that of some person employed or trusted by him. If by private theft or open robbery, without any fault on his part, his property should be invaded while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. In the 52d section therefore, to which the revenue officers seem to have intended to conform so far as the case would admit, which directs them in the case of an incomplete entry to store the goods at the risk and expense of the owner or consignee, no forfeiture is annexed to their removal, unless the penalties of the 51st section or of the 43d section be applied to the 52d. The court is of opinion that those penalties cannot be so applied in this case, not only because from the whole tenor of the law its provisions appear not to be adapted to goods saved from a vessel under the circumstances in which the *Favourite* was found, but because also the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners and consignees could have no control.

It has been urged on the part of the *United States*, that although the property of the owners should not be forfeited, yet that moiety which is claimed by the salvors has justly incurred the penalties of the law. But if the award rendered in this case be not binding the salvors could have only a general claim for salvage such as a court might allow; and if it be binding still they acquired no title to any specific property. Their claim was in the nature of a general lien, and any irregular proceeding on their part would rather furnish motives for diminishing their salvage, if that be not absolutely fixed by the award, than ground of forfeiture. The irregularity too, if any, which has been committed by them, being merely an attempt to assert, in a course of law, a title they supposed themselves to possess, and with no view to defraud the revenue, this court would not be inclined to put a strained construction upon the act of congress in order to create a forfeiture. The third count in the first libel and the second libel claim a forfeiture on the allegation that the goods were concealed; the fact does not support this allegation. There was no concealment in the case.

Taking all the circumstances into consideration it is the unanimous opinion of the court that no forfeiture has been incurred, and that the libels filed on the part of the *United States* were properly dismissed.

The next question to be considered is, to what amount of salvage are the salvors entitled? That their claim is good for something is the opinion of all the judges, but on the amount to be allowed the same unanimity does not prevail.

For the quantum of salvage to be allowed no positive rules are fixed. It depends on the merit of the salvors, in estimating which, a variety of considerations have their influence.

In the case before the court the opinion of the majority is that the sentence of the circuit court ought to be affirmed. This opinion however is made upon different grounds. Two of the judges are of opinion that the award was fairly entered into, and although both parties might be mistaken with respect to the obligation created by the law of *Delaware* yet there is no reason to suppose any imposition on either part, nor is there

any other ground on which the award can be impeached or set aside. Two other judges, who do not think the award obligatory, view it as the opinion of fair and intelligent men on the spot, of the real merit of the salvors, and connecting it with the testimony in the cause, are in favour of the salvage which has been awarded and which has been allowed by the sentences of the district and circuit courts. Three judges are of opinion that the award is of no validity and ought to have no influence. They think the conduct of the salvors in taking the goods out of the possession of the revenue officer, though by legal process, is improper, and that the salvage allowed is too great. They acquiesce however cheerfully in the opinion of the majority of the court, and express their dissent from that opinion solely for the purpose of preventing this sentence from having more than its due influence on future cases of salvage.

The sentence of the circuit court is affirmed without costs.

Circuit Court of the United States.

DISTRICT OF MARYLAND.

JUNE, 1808.

Amos Hayton *v.* James J. Wilkinson.

EXONERETUR ON BAIL-PIECE. BANKRUPT. The circuit court for the district of Maryland will not, on motion, enter an *exoneretur* on the bail-piece, in an action instituted in that court by a subject of Great Britain, against a person who had obtained a discharge under the insolvent laws of that state. The proper manner of bringing the certificate before the court is by plea. The certificate is not conclusive evidence that the discharge was duly obtained. Qu.? Whether the certificate will operate as a bar to the action. *Vide* insolvent laws of Maryland, *ante* p. 95. *et seq.*

THIS was a motion for a rule to show cause why an *exoneretur* should not be entered upon the bail-piece.

The defendant had been discharged under the insolvent law of this state, enacted *November* 1805, by the court of *Calvert* county in May 1808. The present action was instituted in the year 1806 by the plaintiff, a *British* subject, and residing in *England.* He was not returned by the defendant as a creditor. It did not appear that he had received any notice of the defendant's intended application for the benefit of the insolvent law, nor that he had any agent or attorney in this country. The debt was contracted in *England.*

The district attorney, Mr. *Stephens*, by whom this motion was made, contended

1. That a certificate of discharge under the insolvent law of *Maryland* will operate to bar an action instituted by a *British* creditor, in the courts of justice of this country, to recover a debt contracted in *England;* and

2. That a rule to show cause why an *exoneretur* should not be entered upon the bail-piece is a proceeding uniformly

adopted in *England*, and still more strongly supported by the insolvent law of *Maryland*. As our insolvent laws do not require the assent of foreign creditors, not residing within the *United States*, nor having agents duly authorized to act for them, he said it was evidently the intention of the legislature that a discharge, which was regularly obtained, should extend to such claims, otherwise the law would operate with peculiar hardship upon the unfortunate *debtor*. By compelling him to assign *all his effects* to a trustee, for *the use of all his creditors*, the law deprives him of the means of satisfying the claim.

The law has promised him *relief* against his creditors, but what relief does he enjoy, if his discharge do not operate as a bar to this action?

All the former cases on this subject are, as to the effect of a discharge, obtained in one country on an action instituted in another where the debt was contracted. They, therefore, do not decide this point. Here the court is to decide upon the effect of a discharge obtained under the laws of its own state. The question is, whether our own laws or those of *England* are to be preeminent.

Lord *Kenyon*, actuated by a principle which might at least be called contracted and narrow, has decided that a discharge under our insolvent law of 1787, does not bar suit, commenced in *Great Britain*, by a subject of that country, on a cause of action accruing there. 1 *East* 6. *Smith* v. *Buchanan*. So too in *New-York* a similar adjudication has been made. 3 *N. Y. T. R.* 154. *Van Raugh* v. *Van Arsdaln*.

But in *Pennsylvania* a debtor who had been discharged by our laws was protected by an *exoneretur*. 1 *Dall.* 229. *Miller* v. *Hall*. *Idem*. 294. *Thompson* v. *Young*, *et vide Donaldson* v. *Chambers*, 2 *Dall.* 100.*

Our case is very different. We claim the benefit of our own laws in our own state. However it may be contended, that the plaintiff never gave his assent to this law, and that therefore

* [*Vide* 2 *Dall.* 256. *Harris* v. *Mandeville*. And a full review of this question in *East's Reports*, *ubi supra*. 4 *D.* and *E.* 192. and *Cowp.* 824.]

his claims should not be affected. It is a sufficient answer to say that he comes voluntarily into your courts to demand justice, and he must be content to receive it according to the regulations which are prescribed to you by the legislative power.

In the construction of contracts the *lex loei* where they are executed is observed, but in applying a remedy for a breach, you must be governed by the laws of the place where the suit is brought.

The counsel then read an extract from 2 *Huberus B. Tit.* 3. p. 1. 26. translated in 3 *Dall.* 370, *in nota*, on the effect of contracts made in one country and attempted to be enforced in another; and, on the effect of foreign judgments, Judge *Washington's* opinion. *Am. Law Journal, ante p.* 192.

If the principal were to be brought into court in discharge of his bail, he would be entitled to a release on common bail. The effect of this application is no more. It is doing the same thing and waiving an idle and nugatory ceremony.

CHASE, *Chief Justice.* This is a question about which much diversity of opinion prevails, and I understand that different decisions have been made in the different states. It is a point, which is of great consequence to foreign creditors particularly, and therefore it ought to receive a more solemn deliberation than can be had in a mere side-bar motion.

The party should have every opportunity to put facts in issue, and courts will generally endeavour to have facts submitted to a jury. A discharge may be obtained in an improper manner. The certificate is not conclusive. It may be inquired into. This very case shows the necessity of inquiring into it. The defendant was bound to give a true list of all his creditors, but we do not find the plaintiff's name among them.

Justice requires that the property should be divided among all the creditors; but a foreign creditor is not within the law. He cannot claim a dividend, nor can he even come in to allege fraud in prevention of the discharge. Is it honest then, that a plaintiff so circumstanced should be precluded from every means of recovering a debt?

Let the defendant plead this discharge, if he wish to rely upon it. I certainly cannot consent to enter an *exoneretur*.

HOUSTON, *Justice*, thought it unnecessary to give any opinion on the effect of the record of the discharge. The proper course would be to bring it before the court under a plea.

Upon this ground alone he agreed with the Chief Justice, to OVERRULE the MOTION.

Circuit Court of the United States.

GEORGIA DISTRICT, MAY TERM, 1808.

The Bank of the United States *v.* Peter Deveaux, Tax Collector, and Thomas Robertson, Sheriff.

Present the Honourable WILLIAM JOHNSON, jun. Chief Justice, and WILLIAM STEPHENS, Justice.

JURISDICTION. BANK OF THE UNITED STATES. The president, directors and company of the bank of the *United States*, although citizens of the state of *Pennsylvania*, cannot communicate their right of suing to a corporate body of which they are exclusively members, so as to maintain action in the circuit court of *Georgia*.

The constitution takes no notice of corporate bodies in enumerating the cases in which the circuit courts have jurisdiction upon circumstances of the persons. *Const. U. S. Art. III.* §. 2.

THIS was an action brought by the president, directors and company of the bank of the *United States* (established, as they averred, under an act of congress, entitled, an act to incorporate the subscribers to the bank of the *United States*, passed the 26th of *February* 1791) for the purpose of trying the right of the state of *Georgia* to impose a tax on the branch of the said bank established at *Savannah*.

Woodruff and *Harris*, plaintiffs' attorneys; *Leake*, solicitor general; *Mitchell* and *Bullock*, defendants' attorneys.

Per curiam. The action in this case is trespass. The defendants plead to the jurisdiction of this court, the plaintiffs demur generally, and the case presents, for the consideration of the court, the single question of jurisdiction.

It is incumbent on the plaintiffs to give jurisdiction to this court by proper averments on the record; that jurisdiction must be founded on circumstances of the persons, parties to the action or circumstances of the case. The averments intended to give jurisdiction are, "that the president, directors and company are citizens of the state of *Pennsylvania*, and that the bank was incorporated or established by a law of the *United States*." Upon the first of these averments it is to be observed, that this action must be instituted by the plaintiffs either in their individual or corporate capacity. In the former, it could not be maintained, or if at all, they must have sued by their baptismal names. In the latter, the individual is so totally sunk in their corporate state of existence, that though it were true in fact, that the president, directors and company were all citizens of the state of *Pennsylvania*, still they could not communicate their right of suing in this court to the corporate body of which they are members. The constitution takes no notice of corporate bodies in enumerating the cases in which this court shall exercise jurisdiction upon circumstances of the persons. A corporation cannot with propriety be denominated a citizen of any state, so that the right to sue in this court under the constitution can only be extended to corporate bodies by a liberality of construction, which we do not feel ourselves at liberty to exercise. As a suit in right of a corporation can never be maintained by the individuals who compose it, either in their individual capacity or by their individual names, how is the citizenship of the individuals of the corporate body ever to be brought into question by the pleadings? With regard to the jurisdiction of this court, as founded upon circumstances of the action, it is necessary, in order to vest that jurisdiction, that the case should be brought within the description of actions arising under the constitution or laws of the *United States*. The general principle is, that the states

retain all the powers of sovereignty, not expressly relinquished to the *United States*. The states have relinquished the right of taxing individual property held within their jurisdiction, under no possible circumstance, except where such a tax may come within the description of imposts or duties on exports and imports.

There is no question raised under the constitution; neither is it a question arising under the laws of the *United States*. No privilege or right created by the laws of congress is violated. The legal validity of the bank charter is not denied, nor any difference of opinion entertained of its effects. The act incorporating the bank contains no clause exempting the property of the bank from taxation, neither the construction nor constitutionality of any law of congress, arising under the law of the state of *Georgia*, in which we can see no clashing or interference with the laws or constitution of the *United States*. Counsel have argued, that it is a case arising under the laws and constitution of the *United States*, because we must look into the constitution and bank charter, to determine the question of jurisdiction; but if this prove any thing, it proves a great deal too much. For it would go to give this court jurisdiction in every possible case whatever. There would exist the same necessity of looking into the constitution and laws of the *United States*, in a case between citizen and citizen of the same state, or in the most ordinary question of state jurisdiction.

It is true, that this view of the subject may expose this valuable institution to some embarrassment; and it is to be regretted, that it cannot be better guarded, but it is to be hoped, that a just and temperate idea of the true policy of the individual states, with its real and extensive importance to the union, will always afford it ample protection; and if their rights are violated, the state courts are open to them.

It is also true, that there have been cases before the supreme court, in which corporate bodies were parties, that have undergone the review of that court, without any notice being taken of this question; but the answer is, that there were no

pleas to the jurisdiction in those cases, and any objections that may have been raised upon the face of the record appear to have escaped the attention of the court and counsel.

We are happy in understanding that this decision is to be reviewed in the supreme court; its importance in every point of view entitles it to the notice of the highest court in which it can be considered.

Plea to jurisdiction sustained, demurrer overruled, and

JUDGMENT for DEFENDANTS.

High Court of Errors and Appeals

OF THE STATE OF PENNSYLVANIA.

JANUARY 14th, 1785.

Silas Talbot, qui tam, &c. *v.* the Commanders and Owners of the brigs Achilles, Patty and Hibernia.

LETTERS OF MARQUE. CAPTURE. ADMIRALTY JURISDICTION. APPEAL. The owners of letters of marque are responsible for injuries committed on the high seas, by the commanders of vessels sent out by them, at least to the value of the vessels. In cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made. The judge of admiralty for this state may legally take cognisance in cases similar to this. The appeal, in such cases to the high court of errors and appeals for this state, is regular.*

SILAS TALBOT, commander of the armed sloop *Argo*, belonging to, and in the service of these states, duly commissioned, sailed from *New-London*, in the state of *Connecticut*, the twenty-ninth of *August*, 1779, on a cruise. On the sixth

* It was contended by the counsel for the respondent, that the appeal lay to the court of appeals instituted by the *United States;* and by the counsel for the appellants, that the court of admiralty for this state had no jurisdiction in this case.

of *September*, after an engagement of three hours, he took as prize upon the high seas, an armed letter of marque vessel, called the *Betsey*, of two hundred tons' burden, with a valuable cargo, belonging to subjects of *Great Britain*, not being inhabitants of *Bermuda*, and bound for *New York*, then in possession of the *British* naval and land forces. He took the commander and eleven hands out of the prize, leaving three in her, and put on board a prizemaster and eleven other hands, with instructions to proceed to *New London*. The firing was heard, and the engagement for more than an hour seen, by persons on board three letter of marque brigs that had lately sailed from *Philadelphia*. During the engagement, the *Betsey* was perceived from the three brigs, bearing towards them. Her surrender was also seen from on board them. The prizemaster, in obedience to his instructions, proceeded on his voyage, in company with the *Argo*, for *New London*. Some time after, the three brigs were discerned from on board the *Betsey*. Towards evening they chased the *Argo* and *Betsey*. The next day, early in the morning, the prize being in tow of the *Argo*, the three brigs were seen from on board the prize and the *Argo*, chasing them. The brigs approached fast, under *British* colours. Captain *Talbot*, finding it impracticable for the prize to escape, with a trumpet hailed her, directing the prizemaster to throw off the rope, and lie to with the prize, until the three brigs should come up with her, adding, that he with the *Argo* would run a little to leeward and lie to also; and that if the brigs should prove to be *American*, the prizemaster should endeavour to obtain permission for the prize to come down by herself, and inform him of the brigs being friends. In a short time, the brigs came up, and from one or two of them, under *British* colours, the *Betsey* was fired at twice, she then bearing *British* colours reversed, according to the custom of prizes, and being in the latitude of 39 degrees 4 minutes, and the longitude of 71 degrees 24 minutes. When first hailed, the people on board the *Betsey* answered, she was from *Montserrat*. Persons from two of the brigs, one of which had fired at the *Betsey*, boarded her. Among these was *W. D.*

from the last mentioned brig. The commander of this brig was informed by the prizemaster on board the *Betsey*, that she was a prize to the *Argo*, commanded by captain *Talbot;* that the vessel then in sight was the *Argo;* that he was put on board the *Betsey*, as prizemaster, by captain *Talbot*. He showed him his written instructions as such; but, said the *Betsey* had been taken three days before. *W. D.* from on board the *Betsey*, told the said commander, that the prizemaster denied having seen the brigs the day before, or that she was then captured; but from every circumstance, and from the report of one of her *English* sailors, he was convinced, she was the same vessel seen engaged the day before. On board the brig, to the commander of which this information was given, were a boatswain and sailmaker, who had been taken by captain *Talbot* about ten days before, in a vessel from *London*, and sent by him prisoners to *Philadelphia*, and shipped there. One of the persons put into the *Betsey* by captain *Talbot*, knowing them, mentioned this fact in conversation on board the said brig, to *W. D.* The person thus put on board by captain *Talbot* also said, that the *Betsey* had been taken three days before. The papers on board the *Betsey* were examined by *W. D.* in behalf of the three brigs, and the number of names specified in the *English* papers, was found to correspond with the number of persons then on board. From these papers it appeared, that she was a *British* vessel, bound from *Montserrat* to *New York*. *W. D.* made several other examinations on board the *Betsey*, on behalf of the three brigs, and in the course of them was informed by a seaman who belonged to her, while possessed by the *British*, that she was taken the day before. This sailor also said, she sailed from *Montserrat*. Before *W. D.* left *Philadelphia*, he had heard, in the coffee-house there, a few days before he sailed, that the *Argo*, a *New-England* privateer, had taken the *Dublin* cutter, fitted out full of men of war's men. While these examinations were made, the two other brigs chased the *Argo*, under all sail; upon which, captain *Talbot*, concluding they must be *British* cruisers, made sail before the wind and soon left them. The commanders of the three brigs took the prizemaster and hands out of the *Betsey*,

who were carried to *Spain*, except one or two of the least considerable, and also took out of her two cannon, small arms, powder, ball, two coils of cordage, and some other articles. They then put a person on board her, as prizemaster, and men from each of the brigs, with written orders, dated the 7th of *September* 1779, and signed by them all, directing him to "take charge of her as prize to the brigs *Achilles*, *Patty*, and *Hibernia;* carry her into *Delaware*, *Chesapeake*, *Egg Harbour*, or *Boston*, but to get her if possible into *Delaware*, *Chesapeake*, or *Egg Harbour*, for fear of the sloop *Argo's* falling in with her, begging him to stand to the southward that night, and strive hard for *Philadelphia*. These orders were signed on board the brig, the commander of which had directed the examinations before mentioned on board the *Betsey*. The *Betsey* sailed off close by the wind to the southward, was afterwards retaken, carried into *New York*, and restored to the former owners.

On the 17th of *September* 1779, congress resolved, "that in consideration of the distinguished merit of colonel *Silas Talbot*, a commission of captain in the navy be given him, and that the marine committee be directed to provide a proper vessel for him as soon as possible." On the first of *March*, 1780, congress resolved, "that any interest the *United States* may have in the capture of the *Betsey*, by the sloop *Argo*, captain *Silas Talbot*, be relinquished to the said captain, and the officers, seamen and mariners, under his command at the time of the capture." On the 13th of *March*, 1780, captain *Talbot*, *qui tam*, &c. filed his bill in the court of admiralty for this state, against the three brigs, their owners, and commanders. Process was issued accordingly. On the 27th, the owners came severally before the court, and entered into stipulations for the performance of the decree. *August* 29th, a plea to the jurisdiction, filed, "for that in cases of damages to be assessed or recovered to make satisfaction for a wrong or trespass to person or property, the prosecutions ought to be in courts of common law." Replication, "that the cause of action was within the jurisdiction of the admiralty." Plea dismissed, *respondeant*

ouster awarded, and plea of not guilty filed. *July* 19th, 1783, decree, that the libellants have and recover of the respondents twelve thousand seven hundred and ninety-one pounds five shillings, with costs, and on the 22d the respondents appeal.

DECISION ON THE APPEAL.

There are two principal questions concerning jurisdiction in this cause.

First, Whether the court of admiralty for this state had jurisdiction?

Second, Whether this court has jurisdiction?

The first has been subdivided into these secondary questions:

First, Could the court of admiralty for this state take cognisance, as an instance court, supposing this cause not to be a cause of prize?

Second, Did that court take cognisance as a prize court?

It is acknowledged, by the counsel for the appellants, that if this is not a cause of prize, the court of admiralty might take cognisance as an instance court, it being now settled that damages may be assessed in the admiralty, if it was not for an objection arising from the act of assembly for regulating and establishing admiralty jurisdiction in this state. By that act the judge of the admiralty shall "have cognisance of all controversies, suits and pleas of maritime jurisdiction, not cognisable at the common law, and thereupon shall decree as the maritime law, the law of nations, and the laws of this commonwealth shall require." The objection made is, that the present controversy is cognisable at common law.

It is manifest from this act, that in framing it, the legislature took into consideration the *English* statutes relating to things done upon the high seas, and particularly the statutes of the thirteenth of *Richard* the Second, ch. 3. and 5. and the second of *Henry* the Fourth, chap. 11. by which, "admirals and their deputies are prohibited from meddling with any thing done within the realm of *England*, but only with things done

upon the seas, according to that which hath been duly used in the time of *Edward* the Third," and it is " declared, that the court of the admiral hath no manner of conusance, power or jurisdiction of any contract, plea, or quarrel, or of any other thing done or rising within the bodies of counties, except in cases of death or mayhem done in great ships being in the main stream of rivers beneath the points* of the same."

It is clear, even from these cautions against encroachments of the admiralty upon the courts of common law, and from the well known dispute, mentioned in *Coke's* fourth institute, that the jurisdiction of that court, as to " things done upon the sea," is acknowledged to be proper; and, that as to them, the jurisdiction of the common law courts was not proper, but only acquired by a fiction, in supposing them to have been done in some county, when they were not.† The common law courts had a great advantage. They used it. There was no superior court to prohibit them. Upon certain suggestions which they knew to be both false and impossible, they assumed jurisdiction; and would not permit evident truth to be regarded. With such laboured ingenuity has the jurisdiction of common law courts, as to acts upon the high sea been sustained, to the great mortification of sir *Thomas Rydlye*, and other learned civilians,‡ the former with much commendation from the rest, very gravely undertaking to prove, that a ship could not sail in *Cheapside* in the city of *London*,‖ the place usually assigned in suggestions, as the scene of naval transactions.

* Doctor *Zouch*, in his " jurisdiction of the admiralty," p. 85, urges strong reasons against this construction; and in *Owen's Reports*, p. 122, it is said by the court, that the statute of the 15th of *Richard* the 2d, is misprinted; for the translator mistook bridges for points, that is to say, the land's end.

† 4 *Inst.* 134 *to* 143. 3 *Blacket.* 43, 106, *et Fortescue De laudibus*, 67 *et in notis.*

‡ *Fictio est in re certa, ejus quod est possibile, adversus veritatem, pro veritate a jure facta assumptio.* Doctor *Godolphin's View of Admiralty Jurisdiction*, p. 84.

‖ *Zouch*, p. 131, *God.* p. 105. 3 *Blackstone*, 107.

Yet notwithstanding these statutes, mariners have in *England* been allowed to sue for wages in the admiralty, upon contracts made there within the body of a county, " against the statute expressly," as was held by the judges, when that great man, lord chief justice *Holt*, presided in the king's bench.* The reasons were, that the remedy was easier, because they could join in the suit, and better, because the ship would be answerable.

In the present case, the owners, masters and sailors, of the three brigs could not be jointly sued at common law. If they could not, what a multiplicity of actions must be brought! Supposing the owners, commander, and men of the *Argo* could join in a suit at common law, one of them might destroy the action by a release.† The vessels are not liable in the same manner at common law, as they are in a court of admiralty.

If the court of admiralty for this state cannot take cognisance of things which courts of common law may draw into their cognisance, it seems to have been nugatory in the legislature to have given that court any other jurisdiction than in cases of prize; for, even in the case of wages, justly a favourite object of admiralty jurisdiction, mariners may sue for them at common law.

It appears to have been the intention of the legislature, that justice should be done in the easiest and best manner; and that by the words " not cognisable at common law," should be understood, " not properly cognisable at common law."

The next secondary question is so connected with the definition of a cause of prize, and the treating of that subject introduces so many considerations concerning relative circumstances in these states and the law of nations, and these again are so combined with inquiries as to the jurisdiction of this court, that they cannot be conveniently, at least not easily, separated. We will at present therefore, pass to the second principal question, reserving till that shall be discussed, what peculiarly relates to the question we now leave.

* *Sal.* 33. † 3 *Lev.* 355.

This state has all the powers of independent sovereignty, by the declaration of independence on the 4th of *July* 1776, except what were resigned by the subsequent confederation, dated the 9th of *July*, 1778, but not completed by final ratification, until the 1st of *March* 1781.

By the confederation, the *United States* are vested, among other things, with the " sole and exclusive power of establishing rules for deciding in all cases, what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces, in the service of the *United States*, shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures.

Such a court was established by the style of " the court of appeals in cases of capture."* By the commission, the judges are " to hear, try and determine all appeals from the courts of admiralty in the states respectively, in cases of capture, which now are, or hereafter may be duly entered and made in any of the states."†

It was resolved by congress, *May* 24th 1780, " that all matters, respecting appeals in cases of capture, now depending before congress, or the commissioners of appeals, consisting of members of congress, be referred to the newly erected court of appeals, to be there adjudged and determined according to law."

It is necessary to inquire what is the reasonable and legal meaning of the words of the confederation, and of congress in their several acts relative to this subject, for that is the true meaning.

Thus we shall be led into a construction, by which the positive words may be properly and justly modified.

What are the foundations of such a construction here?

First, The counsel for the respondent are themselves com-

* Acts of congress, *May* 24, 1780.

† Acts of congress, *February* 2, 1780.

pelled to qualify the generality of the expression, " establishing courts for receiving and determining finally, appeals in all cases of captures," by adding, " as prize." The addition is indispensably necessary; for without it, the words would comprehend every kind of taking, on land and water, in peace and war. Having been obliged to go so far, in qualifying the extent of the original expression, we are under the same necessity of explaining the terms of qualification themselves; and certainly we have the same right, founded on reason and law, to explain them, that we had to introduce them. In doing this we shall find

Secondly, That " captures, as prize, by citizens of the *United States*, may be carried into foreign countries, and be legally proceeded against, in the courts of admiralty there;" and therefore it is to be inferred, that the confederation intended only such captures, brought *infra praesidia* of the *United States*. That this was the intention thereof, further appears, as,

Thirdly, Congress, in the commission and resolution before mentioned, have shown their sense of the words " cases of captures," by using them in reference to appeals in " cases of capture, which then were duly entered and depending," as well as to future cases; but none were " then entered and depending," except where the " captures" were brought *infra praesidia* of the *United States*. This sense of congress, will appear still more plain from their several following resolutions, prior to the confederation; which were in force at the time of the capture made by captain *Talbot*, and which were the groundwork of the ninth section of the confederation.

November 25, 1775.

That it be recommended to the several legislatures, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, to determine concerning captures to be made. If the capture be made on open sea, the prosecution shall be in the court of such colony as the captor may find most convenient; provided, that nothing in this resolution, shall be construed so as to enable the captor to remove his prize from

any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized, within any harbour of the same. That in all cases, an appeal shall be allowed to congress, or persons appointed by them. That when vessels are fitted out by private persons, the captures made shall be to the use of the owners.

December 5.

That in cases of recaptures, the recaptors shall retain for salvage, according to the time, &c.

March 23, 1776.

That all vessels and goods belonging to inhabitants of *Great Britain*, taken on the high seas, by armed vessels of private persons, and commissioned, being libelled and prosecuted in any court erected for trial of maritime affairs in any of the colonies, shall be deemed and adjudged to be lawful prize. Vessels and goods taken near the shores of a colony, by the people, or a detachment of the army, shall be deemed lawful prize, and condemned in the court of admiralty of that colony. Commissions to be obtained, and bonds to be given for observance of instructions from congress.

Instructions to the commanders of private vessels of war: "You shall bring such vessels, &c. as you shall take, to some convenient port of the united colonies, that proceedings may thereupon be had in due form, before the courts which are or shall be there appointed, to hear and determine causes civil and maritime. You shall bring one or two of the principal persons of the vessel, as soon as may be, to the judge of such court, to be examined, and deliver to the said judge all papers, &c. You shall keep and preserve every vessel, &c. by you taken, until they shall, by sentence of a court properly authorized, be adjudged lawful prize, not breaking bulk, nor suffering such a thing to be done."

Fourthly, By the maritime law of nations, the appropriation of jurisdiction to a particular court of admiralty depends upon

the capture being *infra praesidia*,* that law regarding proceedings *in rem*, the acquittal or condemnation of the ship or goods.† It would be injurious to nations if it was otherwise; for it would cause competition of jurisdictions, and occasion frauds. The usual method is simple and fair.

Fifthly, The articles in the treaties of the *United States* with *France*, the *United Netherlands*, and *Sweden*, with relation to prizes, refer to the cases of prizes conducted into the ports of the contracting powers, relying on cautions against malversations and contraventions to be given by commanders of private vessels of war, rules and regulations for deciding the legality of prizes, and trials in courts of admiralty generally.

Sixthly, An authority to " establish rules for deciding in all cases, what captures on land or water shall be legal, and courts for receiving and determining finally, appeals in all cases of captures," as prize, brought *infra praesidia* of the *United States*, together with the other powers vested in congress, will sufficiently obviate the mischiefs apprehended from the irregularities of citizens of confederated *America* upon the high seas.

Foreigners are protected by the confederation, from the irregularities mentioned; for congress can " exclusively, appoint courts for the trial of piracies and felonies committed on the high seas," and can send out a naval force to cruise for and seize the offenders. If the respondent was a *Frenchman*, and the decree goes against him, he could not justly complain; for he instituted his suit in an *American* court. If the appellants were *Frenchmen*, and the decree goes against them, they could not justly complain, for they took without battle, by force and violence, from a friend and ally, that which in their sight, according to their own allegations and proofs, he had before fought for and captured, and afterwards voluntarily put themselves within the jurisdiction, precinct, and power of an *American* court. What are the sentiments of learned authors, treating of the law of nations, upon such an occasion? " *Quae*

* *Blackst.* 108.

† Answer of the *British* court to the memorial delivered by order of the king of *Prussia*. *Exposition des motifs*, II. 12 *Mod.* 143.

ab hostibus capiuntur, statim capientium fiunt;" which is to be understood when the battle is over. Voet, and many writers he refers to, maintain with great strength, "*per solam occupationem dominium praedae hostibus acquiri.*" One argument used to prove it, is, that the instant the captor has got possession, no friend, fellow soldier, or ally can take it from him, because it would be a violation of his property."* In either case, and in the strongest light in which the affair can be viewed, it is no more than a matter to be treated of between their sovereign and the *United States.*†

If it be said that congress should have a legal mode of making compensation, by rectifying improper decisions against foreigners, thereby to prevent disagreeable consequences, it is a doctrine that cannot be universally admitted, for reasons too plain to be insisted on. If it be confined to acts on the high seas, provision has been made by the confederation, in the cases where it was judged necessary. What the rulers of nations desire and stipulate for in treaties, as to transactions on the high seas, is, to secure their people from being plundered by the citizens or subjects of those with whom they treat. That great point being guarded, and it is guarded here, the danger of consequences from cases that rarely occur, complicated with a variety of circumstances and decided upon in open court, are not to be apprehended. When sovereigns are determined to quarrel, they will never want pretences; but while they revere the sacred obligations of justice and humanity, or the precious sentiments of the good and wise in their own and succeeding ages, they will not disturb the repose of the world by violating the law of nations, upon slight claims of their subjects, or "*in re minime dubia.*" Neither can one of these states prey upon another, without violating the confederation, for by that "no vessel of war shall be kept up in time of peace by any state, except such number only, as shall be deemed ne-

* Lord *Mansfield*, delivering the resolution of the court, in the case of *Goss* and another, against *Withers*.

† *Show.* 232. *Raym.* 473.

cessary by the *United States* in congress assembled, for the defence of such state or its trade; nor shall any state engage in any war without their consent, unless invaded by enemies, or certainly advised of an intended invasion by *Indians;* nor grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the *United States* in congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, unless infested by pirates, and then only until the *United States* in congress assembled, shall determine otherwise." Besides, " all disputes and differences concerning any cause whatever, are determinable by courts to be established under the authority of congress."

Let us now inquire, whether the present case is such a cause of prize as is mentioned in the many cases that have been quoted by the counsel for the respondent.

In what circumstances is any of those cases like this? Does it appear from any of them, that the prize court in *England* would decide such a case as this? Does it appear that the courts of *Westminster-hall*, in any action for such a trespass as this, would refuse to take cognisance, because the original taking was a capture as prize? Does it appear that they would refuse to take cognisance, under colour that the second taking was a capture as prize? If they should, ought any such decision to have weight with us in this case? What are the cases quoted? A justification by persons of original captures made by themselves, because made as prize. What is this case? A justification by persons of their conduct, after a capture made in battle, by others in their sight, under pretension of right, founded on that circumstance. If they say the second taking was an original capture as prize, their assertion is falsified by their own proofs, that they saw the capture made by others the day before. If they say their proceedings were united with the original capture as prize, by being in sight at the time, let them take care that their pretension of right is well founded.* If it

* *Comb.* 367.

is not, their proceedings are distinct from the original capture, and they are plainly trespassers, and must abide the consequences. We are clearly of opinion, that their pretension of right is utterly unfounded, and that the whole conduct of the commanders and crews of the brigs was cruel, unprovoked, wanton, and *mala fide*. In this very singular and extraordinary case, they have exerted themselves to disable the respondent from proving the capture to be prize; and is the sole question afterwards, to be, prize or not? What necessity is there for determining whether the *Betsey* was prize or not? Is it not evident from the case of *Combs* against the hundred of *Bradley*, in *Salkeld's Reports*, and of *Goss* and another against *Withers*, in *Burrow's*, and many other cases, that an action will lie on possession by the plaintiff? And with what peculiar force does the reason apply in this case, for the action being maintained merely on the possession? This court and the court of admiralty are competent not only to direct proceedings, but to ascertain facts, judge of them and the law upon them, and assess damages as justice may require. As to the notion of mistake excusing, it is a *petitio principii*. The mistake does not appear; the crime does. So far from behaving as partners in the capture with the *Argo*, the commanders of the three brigs who saw the surrender to her, chase her off; send the *Betsey* as prize to themselves only, for a port distant from the home of the captors, and in the eye of the wind, though in a part of the sea where she was particularly exposed to dangers from the enemy, with orders to avoid certain ports, for fear of the *Argo's* falling in with her. In fact, it was not a real but a pretended capture as prize, by them. Are we then bound, in such a case, to call it a cause of prize, because the original taking was a capture as prize? Or are we to refuse to call it a trespass, though the second taking was not a capture as prize?

How far soever the learned judges in *England* have carried the justification of captures, from the circumstance of their being made as prize, yet they never have carried it as far as this case extends. That they have gone a great way is evident. In the cited case of *Vanderwoodst* and others against *Thomp-*

son; the defendant, in an action of trespass, having a letter of marque, took a vessel that made some resistance, and carried her to *Newcastle*, where she was seized by the custom-house officers, for having smuggled goods on board, and she was afterwards condemned in the exchequer. It was contended for the plaintiff, that the capture was unlawful, because the defendant did not belong to the custom-house, and he could not justify the seizure under the hovering act of 6 *Geo.* 1. *ch.* 11. as king's ships only can seize under such circumstances. It was held, " As there was reason to suppose that the ship was a pirate, though the jury should be satisfied she was not really so, yet the action would not lie." Afterwards, " there was a motion for a new trial, which upon consideration, was denied by the court."

If that cause was cognisable in the prize court, and if that court determines solely by the law of nations and treaties, as is laid down by the judges, how were other nations interested in the principle of such a decision? If it was not cognisable in the prize court, how can it be applied to the present case, in favour of the respondent?

To proceed. If the courts of *Westminster-hall*, in an action for such a trespass as this, should refuse to take cognisance because the original taking was a capture as prize, or under colour that the second taking was a capture as prize, ought any such decision to have weight with us in this case? It ought not.

Such a decision must turn entirely upon the municipal law of *England*. It must be founded upon this principle, governing in the cases cited by the counsel for the respondent; " that of a seizure as prize, the common law does not take notice as a trespass." *Lecaux* and *Eden*. Admit the principle. It applies not. This is not a common law court. The act of assembly establishing this court makes it " a court of appeals from definitive sentences or decrees of the admiralty." We are therefore a court of admiralty. " If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country, a superior court of review, &c. to which the parties who think themselves aggrieved may appeal; and this superior

court judges by the same rule which governs the court of admiralty, viz. the law of nations and treaties. This manner of trial and adjudication is supported, alluded to, and enforced by many treaties."* We are a court of admiralty competent to judge by that rule. The act of assembly establishing admiralty jurisdiction in this state, declares that the court shall be governed by "the law of nations." Whatever in the law of nations relates to a court of admiralty, relates to this court, because no treaty has diverted the application.†

Much has been said of a distinction in *England*, between the instance court and the prize court, though the powers of both are exercised by the same person; and it is urged that only the latter judges by the law of nations and treaties. We are told, "it is no more like a court of admiralty, than it is to any court of *Westminster-hall*; that the manner of proceeding is totally different; that the appeal is different, to delegates from the admiralty, to commissioners consisting of privy counsellors from the court of prize; that to constitute the authority of the prize court, or to call it forth in every war, a commission under the great seal issues," &c.‡ Such a distinction may prevail in *England*, but is it known or regarded in other nations? The words "to call it forth," are material. It seems only a solemn, official notification to the admiralty, that there is a war, and that it may proceed accordingly, as a declaration of war is a notification to the people in general. But this declaration does not make the war in the one case, nor, perhaps does the commission constitute the authority in the other. It is confessed, "that the most ancient instrument shows a prize jurisdiction either inherent or by commission in the admiral. It is a letter from *Edward* the Third to the king of *Portugal*;" and "that since the reign of queen *Elizabeth*, the judge of the admiralty, either by virtue of an inherent power, or the king's commission, or both, has solely exercised the jurisdiction of prize, and that

* Answer of the *British* court, &c.

† Answer of the *British* court, &c. *Vattel, b. 2. ch. 7. 3 Blackst.* 69.

‡ Lord *Mansfield* delivering the resolution of the court, in the case of *Lindo* against *Rodney* and another.

as far back as particular cases can be traced, which is for a century, the admiralty has judged of and condemned goods taken on land, as prize, as well as goods taken on sea."*†

What do treaties, ancient and modern, stipulate for in order to guard against violences on the seas? A trial in the court of admiralty as soon as possible, before the effects taken are in any manner to be disposed of. Why? because by the maritime law of nations, that court judges by the law of nations and treaties. Sir *George Lee*, doctor *Paul*, sir *Dudley Ryder*, and Mr. *Murray*, now lord *Mansfield*, in their report, which forms the principal part of the answer of the *British* court, and is so celebrated by Messrs. *Montesquieu* and *Vattel*,‡ say, " By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be or not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon, as prize, in a court of admiralty, judging by the law of nations and treaties. The proper and regular court for these condemnations, is the court of that state to whom the captor belongs."

Are we then, because in *England* they call the admiralty court a prize court, when it acts in a cause of prize, and it then proceeds in a different manner, with an appeal to the privy council, to reject " the universal and immemorial" compact of mankind? There was a time when we listened to the language of her senates and her courts, with a partiality of veneration, as to oracles. It is past; we have assumed our station among

* Lord *Mansfield*, delivering the resolution of the court, in the case of *Lindo* against *Rodney* and another.

† The very great antiquity of the court of admiralty in *England*, and the extent of its jurisdiction, may be known from the learned *Selden's Notes on Fortescue De laudibus*, p. 67. *Zouch*, 44, &c. *Godolph.* p 22, &c. Though the authority of this court, with respect to matters in which foreign nations may be concerned, and particularly to captures *jure belli*, is treated of, yet no distinction is made by these authors, as to the court of admiralty and the court of prize.

‡ *Montesquieu's Letters*, 5 *March*, 1753. *Vattel*, *b.* 2. *ch.* 7. § 84.

the powers of the earth, and must attend to the voice of nations; the sentiments of the society into which we have entered.

Lord *Mansfield*, in the cause of *Lindo* v. *Rodney* and another, said, "the end of a prize court is to suspend the property till condemnation; punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis*, if upon the most summary examination, there does not appear a sufficient ground; to condemn finally (if the goods really are prize) against every body, giving every body a fair opportunity of being heard: a captor may, and must force every person interested, to defend; and every person interested, may force him to proceed to condemn without delay. These views cannot be answered in any court of *Westminster-hall*, and therefore the courts of *Westminster-hall* never have attempted to take cognizance of the question, prize or no prize; not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject."

These views are answered here in the court of admiralty, and with as good cautions as in *England;* and as far as a court of appeals is concerned, they can be answered in this court as fully as in a court of appeals to commissioners there.

It seems proper, here, to take notice of the objection against the authority of this court, founded on the words of the law by which it was established, prior to the completion and final ratification of the confederation. It is constituted "a court of appeals for reviewing, reconsidering, and correcting the definitive sentences and decrees of the court of admiralty, other than in cases of capture upon the water in time of war, from the enemies of the *United States*," &c.

The construction of these words depends upon the resolutions of congress, the confederation, and the law by which the admiralty jurisdiction is established, taken together. If the principles of our preceding construction are right, they apply as aptly here, and the appeal is regular. If not, there will be a defect of justice. The legislature intended to give this

court an authority to receive all appeals from the judge of the admiralty, where they were not resigned to a continental court of appeals. This was not resigned. It therefore belongs to this court. We will endeavour to promote justice, according to the intentions of the commonwealth, conveyed in the laws; and not demit any part of her sovereignty, unless we are convinced beyond a doubt, that it is our duty to do so.

We now return to the last of the secondary questions. Did the court of admiralty take cognizance as a prize court? In considering this question, a very strict attention must be had to the proceedings of the court of admiralty in this case. That court was also erected by an act of assembly, prior to the completion and final ratification of the confederation. It is, to be sure, a court of prize, and an instance court, if that mode of expression be preferred; or, in other words, the judge, who has but one commission, may try causes of prize and other matters of admiralty jurisdiction. There is a difference in his proceedings for condemnation in causes of prize, and those in other cases. If his style by law is, "judge of the admiralty," the reasonable and legal meaning of the third, fourth, and sixth sections of the law, under which he acts, is, that in trying a cause of prize, the vessel or goods taken, must be within his jurisdiction, precinct and power. They are these. "That in cases of prize, capture, or recapture upon the water, from enemies, or by way of reprisal, or from pirates, the same shall be tried, adjudged, and determined, as well to the question whether prize or not, as to the claims of the parties interested or pretending to be interested in the same, by the law of nations and the acts and ordinances of congress, before the said judge, by witnesses, according to the course of the civil law;" and, "That the captain or commander of any ship or vessel of war, or prizemaster or other person, having charge of any capture or recapture, or other property seized upon the water as aforesaid, who shall conduct or bring the same into port, shall immediately deliver the same, without diminution, to the marshal of the said court of admiralty."

The law then goes on to direct the mode of proceeding to the condemnation, ordering, "that the judge shall cause notice to be published immediately, in some newspaper, of the day appointed for the trial of such prize, inserting therein the name, size, or burden, and other description of the said vessel, so taken and brought into port; the name and surname of the master; the place she last sailed from, the port for which destined, and in a case of recapture, by what ship or vessel taken; to the end that all persons concerned may appear and show cause, if any there be, wherefore such capture, or recapture, goods, merchandize, or other property, should not be condemned and adjudged to the libellants."

Does the present case in any manner resemble the "cases of prize" described in this law? Where are "claimants interested or pretending to be interested?" Claimants are voluntary applicants for justice. Shall trespassers, compelled to answer for their wrong, cover themselves with that character? Can there be "claimants," but in a proceeding *in rem?* How would the publication before mentioned suit such claimants as the appellants? Were the proceedings of the judge in this case, such as he constantly has observed in cases of prize? They were not. Application was made to him for damages. He proceeded in that line. Here is neither libel nor process against the capture. No monition, "No notice" under the act of assembly.

What could give the judge of the admiralty for this state, jurisdiction to proceed as a court of prize, upon a capture, contested between citizens of different states, which is the case here, rather than any court of admiralty in any other state, when the property captured was not within the power of his jurisdiction? because, it is said some of the offending captains and their vessels came into this port. Does the jurisdiction of a court of prize depend on certain offenders with respect to the capture coming into a port? Where are the authorities of law to show that this circumstance can give such jurisdiction, or, that there can be an institution of a cause of prize, according to the maritime law of nations, for damages only? The

authorities cited, that were thought most apposite, and were most relied on by the counsel for the respondent, were those of *Brown* and *Burton* against *Franklin*, the king's proctor; and of the king against *Broom*. But they are not in any manner applicable. In the first, the plaintiffs, masters of two vessels, but having no regular letters of marque, took a *French* ship, cargo and money, upon land, in the *East Indies;* they being *English* subjects, it was held, that they acquired no right by this capture, but that it, was a perquisite of the admiralty. The king's proctor, upon the usual monition, got a sentence of condemnation for the whole, in order to make them account. In brief, they had effects in their hands, which, by the maritime law of *England*, belonged to the king or his admiralty, and they were obliged to account for them according to that law.* Lord *Mansfield* calls it a proceeding *in rem.*† The second case was of the same kind, and was decided on the same principles. It was further said, by the counsel for the respondent, that the court of admiralty, that first proceeds in such a case as the present, acquires an exclusive right of deciding upon it, in the same manner as the nation that first commences a judicial process against pirates, may pronounce sentence against them. To say no more on this comparison, it is sufficient to observe, that such a right may be attributed to the atrocity of the guilt, the offenders are *hostes humani generis.*

If the coming of trespassers, or of the vessels in which they trespassed upon the high seas, within the power of a judge's jurisdiction, authorizes him to proceed against them, to what confusion may it lead? A capture is made from an enemy; afterwards friends trespass against the prize, and arrive in different ports, the fate of the prize being unknown. They are prosecuted in one or more courts of admiralty. The prize at length arrives, in a different port, and is libelled in a different court of admiralty, for condemnation in the usual manner. What contests for jurisdiction must ensue? "*Quod inconveniens est non licitum est.*

* 12 Mod. 135.

† *Le Caux* and *Eden* in the notes.

We are unanimously of opinion, that the judge of the admiralty for this state had jurisdiction in this cause, and that the appeal to us is regular. We decree, that the respondent recover and have of the appellants, 11,141*l.* 5*s.* 4*d.* with costs, except those in this court, of which each party is to pay a moiety.*

Supreme Court of Pennsylvania.

Commonwealth *v.* William Cobbett. Dec. 1800.*

Present SHIPPEN, Chief Justice; YEATES, SMITH and BRACKENRIDGE, Justices.

DEBT ON RECOGNIZANCE FOR GOOD BEHAVIOUR. In *Pennsylvania* an action of debt lies *sur* recognizance for good behaviour, without a previous conviction, or indictment, for libellous matter, which has been published subsequent to the date of the recognizance.

But I understand that a different decision of this important point was made in *Virginia* in the case of *Callender*.

THIS was an action of debt, grounded upon a recognizance of two thousand dollars, in which the defendant had been bound on the 18th *August* 1797, by *M'Kean*, the late chief justice. The condition was that the defendant should be of "good behaviour towards the commonwealth and all the liege subjects," until the next sessions of oyer and terminer, to be held by the justices of the supreme court. The breach assigned was, the publication of a number of libels by the defendant in "Porcupine's Gazette," of which the defendant was the editor, subsequent to the date of the recognizance and prior to the institution of this suit. These publications, which

* [It was brought to *December* Term 1797, and was tried 13th, 15th, and 16th *December* 1800.]

were complained of as being libellous, respected the late governor *Mifflin*, the board of health of the city of *Philadelphia*, the memory of Dr. *Franklin* and Dr. *Rittenhouse*, the *Spanish* and *French* governments, the people of *Virginia* and other states of the *United States*, &c.

The defendant pleaded *nil debet*, and it was agreed by the counsel on each side that the cause should be argued on the merits.

M'Kean attorney general and *Ingersoll* late attorney general appeared for the commonwealth. *Lewis* for the defendant.

M'Kean opened the case by some remarks on the law of libels and a statement of the circumstances of the present suit. He concluded by reading the various publications which were charged as libellous.

Lewis raised three points. He inquired,

1. Whether the chief justice possessed authority to take a recognizance for good behaviour?

2. If he had, whether this recognizance is conformable to the stat. *Edw.* 3.

3. Whether the defendant has incurred a forfeiture of the recognizance?

The counsel contended that the chief justice and justices of the supreme court had no authority to take recognizances for good behaviour under the stat. 34 *Edw.* 3. *chap.* 5. and that if they did possess this power, yet that the chief justice had not taken this in conformity to the statute. It should be "of good behaviour towards the commonwealth and all the liege people of the commonwealth." The words of this recognizance are too general and indefinite, since they might be construed to extend to the people of any other government than those of *Pennsylvania*, to which they ought to be restricted. From the very terms of the warrant, under which the defendant was brought before the late chief justice, being for libels on the king of *Spain* and his minister, the chevalier *d' Yrujo*, on Messrs. *Fox*, *Sheridan* and other foreigners, as well as the specification of libellous publications which are now charged as breaches of the condition of the recognizance, it is evident that

an attempt is made to give to this recognizance an operation which it cannot receive according to principles of law, and therefore it is wholly inoperative and void.

On these two points, Mr. *Lewis* commented very largely and cited several authorities in support of his reasoning.

He was followed by *M'Kean* and *Ingersoll*, but the reporter regrets that he has no note of their arguments.

The Court were unanimously of opinion that the justices of the supreme court have the power to demand surety for good behaviour, and that notwithstanding the words employed by the late chief justice, the recognizance is not void, because the construction naturally arising from them would confine the recognizance to the people of this commonwealth; and whatever were the objects contemplated, yet it cannot extend further than to the people of this commonwealth.

M'Kean, on the third point, stated that a recognizance for the peace may be forfeited by any act which tends to a breach of the peace, and a recognizance for good behaviour by the same act or by any other which is *contra bonos mores*, 4 *Com. Dig.* 254. 143. 149, 150. 2 *Rol. Rep.* 200. *Cro. Eliz.* 86. 2 *Wils.* 403. 1 *Hawk.* 193. 195.

He then read the several libellous publications and expatiated upon their pernicious tendency.

In the publications of the 25th and 28th *Aug.* the proclamation of governor *Mifflin* under the health law of 1794 is styled an *arbitrary proclamation* and they insinuate that the proceedings of the board of health under it are *murderous*.

4th *Sept.* He charges the governor with *oppression* in the enforcing an old stat. of *Edw.* 3. and putting a *forced construction* upon it for *purposes of oppression*.

15th *Sept.* He charges him with wearing a *bloody liberty cap*, with *boozing among drunken sansculottes* and with *beastly drunkenness*.

16th *Sept.* The proclamation he stigmatizes as *unlawful* and *unconstitutional*.

19th *Sept.* He ridicules a government by the *sovereign people*.

26th *Sept.* He charges governor *Mifflin* with being an *unfeeling, unprincipled republican tyrant.*

13th. *Oct.* He ridicules *John Swanwick* esq. for his *poverty;* and in the same paper he calls Dr. *Franklin the treacherous* and malicious *old Zanga of Boston, &c. &c.*

Mr. *M'Kean* observed that all these publications were clearly libellous: but if any *one* of them be so, it is sufficient to entitle the state to recover.

Lewis. The remaining point to be discussed depends partly upon law and partly upon evidence. The question is whether these publications are sufficiently libellous to work a forfeiture of the penalty of the bond in which the defendant has been bound. If the jury give a verdict in favour of the commonwealth, they cannot apportion the sum according to the enormity or trivial nature of the offence, nor can the court. The verdict must be for the whole sum of two thousand dollars, or be in favour of the defendant. It is therefore highly important to you and to me, to the citizens at large and to posterity, to inquire whether this proceeding be regular. Whether the government or any of its officers have the power, in case of an indictable offence, which this is, if it be any offence at all, to dispense with the necessity of a grand jury, and moreover to fix arbitrarily on the measure of the punishment that shall be inflicted. The constitution of this commonwealth, *art.* 9. *sect.* 10. declares " that no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office."

The object of this provision was undoubtedly to secure to the citizen the intervention of a grand jury, in every case not included in the exceptions. It is intended to exclude the proceeding by information, and of course every other sort of proceeding which savours still more of hardship and oppression. In the proceeding by information the person who is accused loses the protection of a grand jury; but in this case he is not only deprived of that support, but even the measure of punish-

ment is taken from the court, and left to the discretion of any justice of the peace who may have chosen to bind him to his good behaviour. If a chief justice or any justice of the peace can dispense with binding a man over to answer in a regular course of law, for the publication of a libel, which is the ground of issuing the warrant, and is allowed to bind him to his good behaviour, it is holding a rod of scorpions over his head to be used in case of any the smallest peccadillo which he may commit; it is a most dangerous inroad upon the liberty of the press which we thought had been established: it is a violent usurpation of the power which the courts possess of apportioning the punishment to the offence: it melts all offences, from the most heinous to the most venial, into one common mass, inflicting on the smallest transgressions that severity of punishment which is due only to the most flagrant misdemeanors. If such things can be done, well may we exclaim, with the defendant, "*Poor Pennsylvania!*"

But what must be the offence which will constitute a breach? The condition of the recognizance gives us the rule by which our inquiry must be guided. The defendant is there bound to be of "good behaviour towards the commonwealth and all the liege subjects," &c. that is, to persons owing allegiance to the commonwealth at the time that the offence was committed. It cannot extend to citizens or subjects of other states or governments, nor to persons deceased long since, because neither of these owe any allegiance to this commonwealth. It is not pretended that a libel against the memory of the deceased is not punishable: but this is not the manner of accomplishing it. The condition is to be construed strictly. It is a contract imposed upon the defendant by the commonwealth, or rather by the chief justice, and cannot be extended to offences not comprehended within its terms. The defendant did not stipulate that he would not libel the dead, nor that he would not publish any libel against a foreigner; but he only stipulated that he would be of good behaviour towards all those who owed allegiance to the commonwealth.

Rejecting then, all that relates to Dr. *Franklin* and *Rittenhouse*, the *Spaniards*, *French* and *Virginians*, and it will be found that all which remains cannot amount to a breach of this recognizance. All the publications related to subjects which were highly interesting and which occupied the whole attention of the public. They were made at a time of great calamity, when dissentions and disputes were carried on with the bitterest degree of acrimony and virulence. They were on topics which intimately excited the feelings of the community, and on which all classes of men spoke in the loudest and most decisive tone against those who differed from them in opinion.

Mr. *Lewis* then distinguished those publications which might be included within the condition of the recognizance from those which he considered were not, in order to show, that of those which were included, some were undeniably true, and others were justified by the temper of the times, the nature of circumstances and the severity of provocation which the defendant had received.

He strenuously urged to the jury that they were the judges both of the law and the fact, and emphatically cautioned them against giving their sanction to a mode of prosecution so arbitrary and irregular; and a precedent so dangerous to the principles of the constitution.

He concluded by reading a part of *Camden's* letter on libels p. 25. in which the author contends that demanding surety for good behaviour affords great latitude for construction, and is therefore much to be dreaded.*

The Court desired that Mr. *Ingersoll*, in his reply, would satisfy them as to the legality of this mode of proceeding, and whether the recognizance could be sued before there was a conviction for such an offence as would create a forfeiture.

Ingersoll denied the authority of *Camden* because, he said, he was a party man who wrote during violent civil commotions, and maintained doctrines which were totally incompatible with

* Vid. Commonwealth v. *Duane*, 1807. Judge *Tilghman's* opinion. American Law Journal, No. II. p. 168.

rules of law which were long settled and firmly established; *e. g.* in *p.* 23, he says, "to pursue a libeller at all is alien from the nature of the *English* constitution," and "no publication however immoral and obscene is a punishable offence." These sentiments were, in themselves, the answer to the passage read by his learned friend across the table.

It had been suggested that he was aiding the attorney general in pressing an unconstitutional verdict, but the action had been brought by him when he held that office; and the more he thought upon the subject, the more firmly was he convinced both from principle and precedent that the proceeding was right. The same proceeding for a similar offence had been instituted against another printer, who was in opposition to the defendant in politics. The brief history of the case is this.

William Cobbett had been charged with endeavouring to excite the government of the *United States* to hostility and war against foreign powers, and the citizens of this country to hatred, contempt and revenge against those powers. This conduct in an alien was highly reprehensible. A lawful and valid recognizance was demanded and taken of him for his good behaviour as it has been determined by the court. After this he continued in the daily habit of abusing not only foreigners and the citizens of other states, but our own government and all that was respected and venerated among us.

Upon this case two questions arise.

1. Are these proceedings, by civil suit, regular, or must an indictment and conviction precede them?

2. If they be regular, has there been a forfeiture?

The ninth article tenth section of the constitution has been read. This section was intended to secure the intervention of a grand jury wherever the consequence of a prosecution might be personal or infamous punishment. But the present case is totally dissimilar; it is simply an action of debt which can only terminate, in case of a verdict in favour of the commonwealth, in recovering from the defendant a sum of money, in the same manner as other debts are recovered. No circum-

stances of corporal or infamous punishment can take place to bring the case within the letter or spirit of the constitution; and if we were prevented from pursuing this mode, how can justice be ever obtained, if the defendant after the forfeiture of his recognizance should escape punishment, by removing into a foreign country, before his apprehension? The common law of *England*, as it stood at the date of our charter, in 1681, was brought into this country by our ancestors. By that law as it then stood, or has since been altered, you are sworn to decide. In 4, *Bl. Com.* 253. it is said that if the condition of a recognizance be broken, it is forfeited, and the party becomes the king's absolute debtor. In 5 *Com. Dig.* 241. *tit.* PLEADER 3 *L.* the recognizance must be sued before an indictment can be preferred.

Brackenridge J. inquired whether the recognizances alluded to by these authorities were not such as are returned to the court and forfeited by their order: if so, is there not a difference between them and a recognizance such as this is which is forfeited without being returned?

Ingersoll. How could an indictment be preferred, if the act creating the forfeiture was not indictable, as may be where the forfeiture is incurred by menaces which is not indictable? 4 *Com.* 255. In *Dalt.* 277. 296. it is said that if the recognizance be forfeited it shall be estreated and sued. In 2 *Bulstr.* 220. is a case of *scire facias* on a recognizance for the peace, sued out of B. R. and no previous indictment, nor was it pretended that there ought to have been, *Cro. Jac.* 598. case of *scire facias sur recognizance* for good behaviour, where, though the breach assigned was an indictable offence, yet no indictment was preferred. *Cro. Car.* 498.* case of *scire facias sur recognizance* of the good behaviour; and the breaches assigned were, the use of bad language, such as, to a constable in the

* A recognizance for good behaviour is not forfeited by rash, quarrelsome or unmannerly words, unless they directly tend to a breach of the peace, to terrify others or to promote sedition. *Cro. Car.* 498. In this case the jury after taking the above words into consideration, returned a verdict for the defendant.

execution of his office, he said, "thou art a lying rascal;" to another who threw down his hedges, "one of you is dead of the plague, and I hope I shall see more of you die of the plague:" to a woman, that "she was a whore and a jade," and other foul words accusing her of incontinency: to one in the church yard. after evening prayer, that "he was a forsworn knave" and "a perjured knave."

Here the defendant was acquitted on the merits, it being determined that the words were not such as tended to a breach of the peace, but there was no pretence that the proceedings were illegal or irregular. *Sayre's Rep.* 139. case of *scire facias sur recognizance* of the peace, the breach assigned was an assault and battery, which was an indictable offence. It was determined by the court that the question whether the defendant committed an assault may be decided on the plea of *not guilty* to the *scire facias*.

This manner of proceeding, therefore seems to be well established both by principle and precedent. Gentlemen may dilate on the hardships of the defendant, but some commiseration is likewise due to the feelings of the peaceable citizen, whose character is lacerated by the relentless pens of printers. If this manner of proceeding be wrong, a quarrelsome person may keep a whole neighbourhood in turbulence and confusion as long as he has sufficient cunning to avoid the commission of an indictable offence. It is true that the power is discretionary and may be abused, but it is necessary for the purposes of justice that a discretion should be vested in some body. If it is abused by the magistrate, he is answerable to this court, and if by this court, they are liable to an impeachment or removal from their seats by an address of the legislature. Case of *Commonwealth* v. *Oswald*, 1 *Dall.* 319. The court who were the persons libelled, without either grand or petit jury proceeded by attachment against the defendant; and having determined on both law and fact, inflicted a punishment.

On the second point he read 4 *Bl. Com.* 250. 1 *Bl. Com.* 150. and 1 *Lev.* 139. to show what constitutes a forfeiture. He then read some of the publications in order to show that they

were highly libellous. After which he stated that the public had a right to expect a verdict according to law. If they are refused in this just expectation, what resort could there be but to the system which Dr. *Franklin* called "club law." The part of the constitution which relates to the liberty of the press is to be taken in connexion with that part which confirms the citizen in the protection and enjoyment of his reputation. If the publications in question related to public concerns exclusively, and were true, no prosecution ought or could be supported, however indecent might be their language. But they consist entirely in personal abuse and illiberal invective. They are grossly false and do not concern, nor are intended to remedy any public abuse.

Shippen Ch. J. delivered the opinion of the court.

This is an action of debt, instituted by the commonwealth on a recognizance for the good behaviour of the defendant, taken before the late chief justice, which recognizance, it is alleged, has been forfeited by the defendant in consequence of a number of libellous publications issuing from his press. The court did entertain some doubts as to this mode of proceeding: they observed that the constitution had guarded against what might validate the practice of filing informations. It was thought that every man was entitled to the chance of two juries before he could be convicted. We doubted, too, on another ground. We thought that we saw the possibility of great oppression in a justice taking up a man and binding him in a sum sufficient to ruin him, if he should afterwards commit any act which might constitute a forfeiture of his recognizance. We thought that, if not authorized by express law, it might be oppressive and ought to be prohibited. We were fearful that this case might be drawn into an example to the ruin of many citizens. We therefore recommended an examination and have carefully considered all the authorities, and the court is unanimously of opinion that this proceeding is regular and legal. The authorities leave an amazing discretion, but so the law is.

The only question then, that remains to be considered, is, whether there has been a breach of the condition of this recognizance. Whatever tends to a breach of the peace is a forfeiture. The definition of a libel states it to be that which tends to a breach of the peace. Then let us ask, are these publications libels? We cannot avoid this opportunity of bearing our testimony against libellers as dangerous to the community. No man is safe if they are permitted under the protection of the liberty of the press, to slander and villify our best citizens. Governor *Mifflin* ill deserved the charges which were made against him. He is represented as a sot, as issuing unconstitutional proclamations; as a tyrant and as a compound of republican villany. These things induce men to take vengeance into their own hands. His abuse of Dr. *Franklin* is also personal. He is represented as a cruel, malicious, revengeful old Zanga. Dr. *Rittenhouse* is also represented as a disorganizer, as joining democratic societies for the purpose of disorganizing, &c. He likewise endeavours to represent the board of health, who deserve our warmest gratitude, in an odious and ridiculous light. It has been stated that libels against the dead or against persons out of the state are not within this recognizance. But why not, since the mischief is the same, that of stirring ill blood.

You are the judges of the law and the fact under the constitution of this commonwealth. How far the law of *England* ought to be extended here, I will not say. It gives a very dangerous power, but the law is so, and we cannot say it is otherwise. We did not doubt what the law of *England* was upon this mode of proceeding, but we were desirous that the question should be examined, how far that law was applicable here, before a precedent should be established for exercising so great a power.

If, however, there should be any abuse of this power, the officers are under the control of this court.

Although you are the judges both of the law and the fact, we cannot help saying that we think these publications libel-

lous, and constitute a breach of the condition of the recognizance.

We have had our share of abus[illegible]rom the defendant, but that circumstance makes no impression upon our opinion. We shall bear equal testimony against the printers of both parties.

Verdict for the Commonwealth.

Court of Oyer and Terminer

OF BALTIMORE COUNTY.

JULY, 1808.

State of Maryland *v.* Baptis Irvine.

INDICTMENT FOR A LIBEL.

THIS was an indictment against the editor of the *Whig*, for having published a false, scandalous and malicious libel on the character of *Edward J. Coale*, esq. register of this city.

The cause came on to be tried on *Monday* the 18th inst. and was continued from day to day, until the *Thursday* ensuing, when the jury retired from the bar, and returned a verdict of guilty on *Saturday* morning.

By the common law of *England* the accused was not permitted to give the truth in evidence, in an indictment for a libel. But the act of assembly under which this prosecution was brought differs from the *English* law. As every office emanates, either mediately or directly from the people, it was of the first consequence that no restraints should be imposed upon the freedom of discussion. Without inquiry there can be no knowledge, and if it be not unshackled from all previous restraints little advantage can result from any investigation. But

while the government has thus thrown out its protection to the honest guardian of the public weal, it has also provided a punishment for the calumniator. However important it may be to the public to obtain accurate information respecting the conduct of its officers, that information cannot be had from polluted sources. The law has placed a shield before innocence to protect it against the assaults of defamation.

Every attempt to shackle the freedom of the press should be regarded with a jealous eye by a freeman. But if that freedom is to consist in the right of depriving an honest man of his good name, and of planting in his breast the corroding thorn which is never blunted, it is better that we erase it from the charter of our liberties.

In the case which is about to be recorded, Mr. *Coale* obtained a signal and glorious triumph. Party prejudice which too often mingles her baleful influence, with the most common occurrences in this country, here had no voice in his favour.

The charges against Mr. *Coale* involved not only his character as a citizen, but implicated his fidelity as an officer. At the time they were published, no reasonable man, no one whose judgment was not distorted by prejudice, or biassed by the malignity of envy, believed that there existed the slightest foundation for so scandalous a defamation. It instantly occurred to all who wished to ascertain the truth, that not only the accounts of the register, but even his books, checks and vouchers were annually submitted to the investigation of a committee of accounts, and were afterwards scrutinized by the two councils of the city before they were passed. The very account, which the editor of the *Whig* had seized upon as food for his malice, had passed this ordeal, and had been found to be correct. That *Baptis Irvine*, who had been here not three months, should have discovered errors which had escaped the vigilance of so many men, whose solemn duty it was to detect them, and who had known Mr. *Coale* for years as a citizen and an officer, was requiring rather too much from the complaisance of credulity. They could not but conclude, as it was ingeniously said by the

junior counsel for the state, that this most sagacious *Argus*, possessed the property, which had been ascribed to *M'Fingal*, of *seeing what could not be seen!*

A grand jury of the country, however, was not so easily satisfied as the citizens. It appeared to the members of this body, that as on the one hand, every person in the community is entitled to protection, not only in his property, but in his reputation, so on the other, the *disinterested patriot*, who boldly steps forward to detect "the knavery of false accounts," and to remove the film from the eyes of a deluded people, ought to be heard. An indictment for libel was accordingly preferred against the editor, under which the laws of this state allow the party charged to give the truth in evidence.

Messrs. *Donaldson*, *Glenn* and *Kell* appeared for the defendant.

Mr. *Stouffer*, who was produced on the part of the defendant, and on whose "*Atlas* shoulders this world of slander rested," testified that he was a member of the city council from the year 1798, until the last year, excepting one year; that the mayor made a communication at the *February* session of each year; at which time, also, the register exhibited his annual account, which was submitted to a committee appointed by the councils. The witness was one of the committee appointed to examine the account for *February* 1807 (the subject of the libel.) In this capacity, he conceived his duty to be, to examine

1. Whether the charges made by the register were correct.
2. Whether the payments were made conformably to the ordinances; and
3. Whether the expenditures authorized by law were made with economy.

To enable him to do which, he expected to be furnished by the register with a ledger, which would exhibit at one view, the amounts appropriated by the various ordinances, and the disbursements made in pursuance of them, as *he had a handsome salary for so doing*. In this reasonable expectation he was dis-

appointed.* The register *merely* gave them his annual account, his *check book, crossed checks indorsed by the payee, his vouchers of payments, and a journal!* They were *obliged* to take it for granted, that the receipts were correctly stated.

After spending three or four days in investigating this account (for *February* 1807) the committee was satisfied that it was correct; and a report in conformity to that opinion was drawn up and left with the witness to be given to the council. But it struck him afterwards, to compare the expenditures with the ordinances making the appropriations. In some items, he found expenditures beyond the appropriations, some of which the register explained to his satisfaction, but he thought it his duty to mention it to the council. He accordingly made another report, in which he stated the sums appropriated, and also those by which the expenditures had exceeded those appropriations. "The members of the first branch expressed their *unanimous astonishment* at it." [Captain *Shrim* testified

* CROSS EXAMINATION.

Major *Small* called. (He was one of the committee of accounts with Mr. *Stouffer*.)

Q. Did Mr. *Stouffer* ask for a ledger?

A. I did not hear him.

Q. Did the register furnish you with a ledger?

A. Yes, he threw one on the table.

Q. Did *Stouffer* open the ledger?

A. I do not know whether he did; but he could scarcely avoid seeing it. I believe we all considered the other book and vouchers as sufficient. If there had been any misapplication of the public money, these books and vouchers were such complete checks upon each other, that it would have been immediately detected.

Mr. Stouffer called again.

Q. Did you ask for a ledger?

A. I don't know that I did.

Q. Was there one thrown on the table for you by the register?

A. There might have been one for all I know.

Q. Did you open it?

A. No.

Q. Did you see it at all?

A. I can't say that I did

that it was generally known among the members, that there had been excesses, before the report was made.]

The councils passed the account, and also an ordinance, appropriating a certain sum to indemnify the register in these expenditures.

On the part of the state, many of the most respectable citizens of Baltimore were produced; *James A. Buchanan*, *James Calhoun*, *Henry Payson*, *John Shrim*, *Baltzer Schæffer*, *John Hillen*, *Jacob Small*, *Thomas Tenant*, *William Lorman*, all democratic republicans (except two) honest, liberal and intelligent men, who had served in the city councils for several years, and had had every opportunity of knowing Mr. *Coale's* conduct, unanimously concurred in giving a testimony the most unequivocal and honourable to his character. Mr. *Buchanan* said emphatically, in the conclusion of his evidence, "Nay I most SOLEMNLY and RELIGIOUSLY BELIEVE, that Mr. *Coale* is INCAPABLE of a DISHONEST ACTION." Each of the three gentlemen who defended the editor, and who were of his party bore the same testimony to the unimpeachable integrity of his character. Indeed, the very ordinance making provision for the expenditure was found to be in the hand-writing of one of *Irvine's* counsel, who at that time was a member of the first branch. Even *Stouffer*, the witness for the defendant, acknowledged that he did not believe Mr. *Coale* was a dishonest man, or had wished to appropriate public money to his private purposes.

The force of such a combination of testimony was irresistible. It flashed conviction on the mind of every man, who was not resolved not to be convinced. *Baptis Irvine* was found guilty of having published "A FALSE, SCANDALOUS AND MALICIOUS LIBEL!" And yet this man, branded as he is with the odious epithet of LIAR, by the solemn verdict of a jury of the country, TEN of whom are of the party to which he pretends to belong, dares, in defiance of all law, order and decency, to continue his wicked and malicious libels, and to asperse the jury who pronounced the verdict, and the judges who determined the punishment.

People of *Maryland*, are you prepared for these things? Will you tamely submit to this prostration of the dignity of your courts, this violent assault upon the independence of your juries, this most atrocious conspiracy against the good order of your society? Of what use is the trial by jury, if the jurymen are to be held up to scorn and detestation, as violators of their oaths, the witnesses as perjurers, and the judges as partial, vindictive and dependent? Who is it that thus violates the sober decorum which your laws enjoin? An emigrant wretch, who has not been six months among you, a part of which time he has spent in gaol, as a punishment for his outrageous conduct.

Since the trial, he has in his own paper, published what he calls the testimony, and to disseminate the poison more widely, the whole of it has been impudently republished with alterations and amendments by its author. I pledge myself that he cannot prove one single evidence as there given, to be correct. Every fact which is of the slightest consequence to Mr. *Coale* is concealed, and every circumstance, opinion or conjecture, which can be tortured into a suspicion against his integrity, is brought in to suit his infernal purpose.

But these remarks have already been extended to a greater length than I had intended. I beg every one who reads the publications of the *Whig* on this subject, to remember these *facts*, which are an abundant answer to his columns of wilful and deliberate falsehoods.

1st. The editor of the *Whig* has been found guilty of having published "a false scandalous and malicious libel" on the character of Mr. *Coale*.

2d. Ten of the jurymen are republicans, and all the judges, and all the witnesses, except two, are of that party.

3d. Every member of the city council, who was produced on the trial testified, that he believed Mr. *Coale* to be a man of irreproachable integrity. Even Mr. *Stouffer* who, as far as strong prejudices excited by personal feelings could go, endeavoured to bolster up the rotten defence of the editor, said he

never believed, that Mr. *Coale* had defrauded the public, and that he was an honest man.

4th. If the register had been guilty of fraud, the members of the council have not had sense enough to discover *these false accounts*, or they have countenanced it in violation of their oaths of office.

And I beg every one to ask himself the question: Who has had the best means of ascertaining the accuracy of the register's accounts; the editor of the *Whig* in gaol, or the members of the city council, who have daily and constant access to all his books, and the jury who were employed three or four days in hearing their testimony? The former has accused and still does accuse *Edward J. Coale*, of being guilty of the *knavery of keeping false accounts*, and the latter have unanimously declared that he is an honest man, and that he has not kept false accounts. Whom will ye believe?

In Chancery.

MICHAELMAS TERM, 1769.

Scott *v.* Scott.

INJUNCTION. The court of chancery will not grant an injunction to stay an execution on a judgment obtained by surprise: but it is not precluded from exercising an equity jurisdiction over the verdict.

BILL to stay proceedings at law by injunction and set aside a judgment obtained by surprise.

Lord *Camden*. When the judgment is completed by a service of execution, it is too late for this court to interfere in the manner prayed; but though this court cannot grant an injunction, yet the equity of it is not altogether restrained. And it would be strange if was, for by such means the plaintiff would be enabled to benefit himself by his own wrong and recover against the justice and equity of his case without any power to control him. In this case, the verdict was obtained by surprise, and though the court cannot grant an injunction, the defendant being taken in execution, yet the verdict ought and must be set aside. It is necessary, however, in all such cases, to prove or give probable grounds to believe the verdict was by surprise; for if the party suffer judgment to pass against him by neglect he cannot have relief in this court for a matter which he might have availed himself of at law.

[*Ex notis m'ri Cooke.*]

Court of King's Bench.

MICHAELMAS TERM, 1805.

Anderson, Bart. *v.* the Royal Exchange Assurance Company.

NOTICE. Corn was insured free from average, unless general, from *Waterford* to *Liverpool*. The vessel was run on shore at *Waterford* on the 28th of *January*, and was wholly under water at high water. Part of the corn was taken out by the insurers and kilndried, and the assured received the net produce. On the 18th of *February*, 21 days after the loss, the assured gave notice of abandonment, which the insurers refused to accept. Held, that the notice of abandonment was too late to entitle the assured to recover as for a total loss.

THIS was an action brought to recover a total loss upon a policy of insurance on a cargo of wheat by the ship *Fanny*, on a voyage from *Waterford* to *Liverpool*, to which action the *defendants* pleaded the *general issue*. The cause came on to be tried at the sittings after *Hilary* term, 1805, before the right hon. *Edward* lord *Ellenborough*, and a special jury, when a verdict was found for the *plaintiffs*, damages 915*l.* 9*s.* 8*d.* and costs, 40*s.* subject to the opinion of the court on the following case:

The ship in question was loaded at *Waterford* in the month of *January*, 1804, with 2406 barrels of wheat in bulk. The term *barrel* is descriptive of measure and quantity only. The policy in question was effected on the account of *Andrew Comber*, of *Liverpool*, merchant, upon 696 barrels of the said wheat, his property. The same were shipped by *Thomas Nevins*, who acted, as the agent of the said *Andrew Comber* at *Waterford*, and were of the value of the sum insured, that is to say, the sum

of 1000*l.* The policy contains the following stipulation. "Free from all average on corn, flour, fish, salt, fruit, seeds, hides, and tobacco, unless general, or otherwise specially agreed." There was no special agreement in the policy, respecting the payment of an average loss on corn. The ship in question sailed from *Waterford* on the voyage insured, on the 28th of *January*, 1804, with the wheat insured on board, and in proceeding down the river she struck upon a rock, which occasioned her immediately to fill with water; and, to prevent her from sinking, she was run on shore. The hull of the ship was for four weeks entirely under water at high water, and, until the cargo was taken out, she could not be raised or removed. The whole of the cargo was damaged, and 1635 out of the said 2406 barrels of wheat were taken out of the said ship, and afterwards kilndried at *Waterford*. The said *Andrew Comber's* proportion of the said 1635 barrels so taken out amounted to 473 barrels, which were delivered to the said *Thomas Nevins*, as the agent of the said *Andrew Comber*. Some part of the remainder of the said cargo of wheat was sold to feed hogs, and the residue thereof was thrown into the sea as unfit for use. The whole quantity kilndried as before stated, except the said 473 barrels belonging to the said *Andrew Comber*, was, two months after the said accident happened, shipped on board another vessel for and arrived at *Liverpool*, and was received by underwriters on policies including losses by stranding; and the said 473 barrels belonging to the said *Andrew Comber*, might have been forwarded in like manner, if he had given directions for that purpose. The said 473 barrels were sold by the said *Thomas Nevins*, and produced the sum of 249*l.* 1*s.* 9*d.* but the expense of saving and kilndrying the same reduced the net proceeds thereof to 95*l.* 13*s.* 4*d.* sterling, which sum has been remitted to and received by the *plaintiffs*. After the said ship had remained four weeks in the situation before described, she was weighed up and taken back to *Waterford, then incapable of prosecuting the voyage*, and continued under repairs until the latter end of *April*, by which time she was repaired. On the 18th and 25th *Feb.* 1804, the said *plaintiffs*

and also the said *Andrew Comber* gave notice of abandonment to the said *defendants*, but the said *defendants* refused to accept such abandonment.

The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover in this action as for a total loss, with benefit of salvage; and if not, then as for a total loss of that part of the goods in question, which were not kilndried. If the court shall be of opinion that the *plaintiffs* are entitled to recover as for a total loss of the whole cargo, with benefit of salvage, then the verdict to stand; but if the court shall be of opinion that the *plaintiffs* are entitled to recover only as for a total loss of that part of the goods in question which were not kilndried, then a verdict to be entered for the *plaintiffs* for the sum of 356*l.* 16*s.* only. And, in case the court shall be of opinion that the *plaintiffs* are not entitled to recover any part of the sum demanded, then a verdict to be entered for the *defendants*.

Clarke J. "There was a total loss in this case; for the ship, by reason of the accident, did not arrive at its port of destination, and the object of the voyage was lost. Where that happens, it is a total loss, although part of the goods is saved. *Manning* v. *Newnham*.* *Mason* v. *Skurrey*† is the leading case upon the construction of the memorandum, which, is founded entirely upon the usage, *Cockayne* v. *Fraser*‡ was a case of a voluntary renunciation of the voyage, and admitting it to be good law it does not apply to this case." He cited also *Goss* v. *Withers*§ and *M'Andrew* v. *Vaughan*‖ to show that the abandonment was in due time.

Lord *Ellenborough*, C. J. "This is not a total loss in fact. While there was any part of the adventure subsisting, it could only be considered a total loss after the abandonment, and that must be made in a reasonable time. I thought at first that, as there was a total submersion of the goods under water, it was a total loss, but as they were fished up and kilndried,

* 2 *Marshall* Insur. 504. *Park* 166. † *Park* 131.
‡ *Park* 114. § 2 *Burr*. 683. ‖ *Park* 115.

there must be an abandonment. It is but three days' post from *Liverpool* to *Waterford*. There were, therefore nearly three weeks or at least eighteen days, during which the *plaintiff* neglected to make the abandonment, and treated the goods as his own, and there is a salvage of 95*l.* 3*s.* 4*d.* received. The *plaintiff* could not go for a stranding, because part of the goods were sent forward, and if he had notice of it on the 31st of *January* which he might have had, he was out of time to abandon on the 18th of *February*."

Judgment for the defendant.

But it being said that the abandonment was in fact within a reasonable time, it was afterwards directed that there should be a new trial to ascertain that fact.

COURT OF KING'S BENCH.

Before Lord Ellenborough and a special Jury. July 1808.

Carr *v.* Hood.

THE plaintiff, who is sir *John Carr*, the author of several books of travels, particularly "The *Stranger in Ireland*, the *Stranger in France*, a *Northern Summer*, and a *Tour* round the *Baltic*," brought his action against the defendant, a bookseller in the *Poultry*, for publishing a libel against him under the title of "*My Pocket Book* or *Notes* for a *ryghte merrie and conceyted* tour through *Ireland* by a knight *Errant*." In this work, the plaintiff's writings were ridiculed with extraordinary wit. The plan of the book was to suppose the traveller making notes of things, to be afterwards inserted in a quarto volume, which notes were extracts from the ridiculous parts of sir *J. Carr's* work. This libel had so rapid a sale, that it came soon to a second edition, when the publisher added some plates, illustrative of the traveller's wanderings through *Ireland*. In one of them the plaintiff was represented as weeping most

bitterly at leaving *Ireland*, and carrying a pocket handkerchief tied up by the four corners, marked "MY WARDROBE," while a lusty porter was groaning under the weighty load of his ponderous travels. The plaintiff in his declaration complained principally of this caricature, and alleged, that he had received special damage by it, inasmuch as two booksellers, sir *R. Phillips* and Mr. *Leigh*, had refused to purchase another work of his, to be entitled "*A Scottish Tour*," for which they would have given six hundred guineas, had it not been for the effect of this publication of the defendant's.

Sir *R. Phillips* was called, who said, that he refused to publish any more of sir *John Carr's* works, because he thought his reputation was greatly injured by the ridicule in the work called "*My Pocket Book*." Upon his cross examination sir *R.* said, *he did not read* or attend to scandalous and anonymous criticisms. He, however, admitted, that he published the *Oxford Review*. But this, though it was anonymous, he said, was an honest *Review*. He also published the work called "*Public Characters*," and also "Anecdotes of the leaders of the *Revolution* in *France*." He was asked, whether he did not read the *Edinburgh Review*. To which he said, that he had not read it these six years.

Lord *Mountnorris* and lord *Valentia* said, that sir *John Carr*, who was knighted by the lord lieutenant of *Ireland*, was strongly recommended to them from *Ireland*. Lord *M.* said, he should have bought "The *Stranger* in *Ireland*," because it spoke so well of *Ireland*, but he read "*My Pocket Book*," and that prejudiced him against it.

The attorney general contended, that the work published by the defendant was a species of fair criticism upon the works of the plaintiff, which were in general compiled of old jokes and inflated common-place reflections upon men and manners, which were set off by hot pressed paper and fine plates. He commented strongly upon the evidence of sir *Richard Phillips*, showed its contradictions, and said, that no books nor reviews could be more libellous than those he had acknowledged

to publish, if severity of anonymous invective could be deemed a libel.

Lord *Ellenborough* declared his opinion to the jury, that every man who published a book laid himself before the public, and became a fair subject of criticism. If his book was penned in a pompous and empty stile, ridicule might fairly be used to strip folly of its self importance. With respect to the caricature, the author of the *Travels* in *Ireland* was the relater of his own history in connexion with that country, and made his own character as an individual and an author, so embodied with the work, that it was impossible to disconnect them. Even the caricatures did not affect the plaintiff, except as the author of the work which had been ridiculed. There would have been no doubt, if sir *John Carr's* private character had been degraded it would have been a libel. Nothing of that kind was imputed to the defendant. Then it was of the highest importance, that criticism should be free, for, without it there could be no improvement in taste, in politics, or in science. Every branch of learning was indebted for its advancement to the severe strictures, which succeeding writers had passed upon the works of each other, and the only question was, whether this author had done more than expose, according to his best judgment, what he conceived to be a vitiated stile of writing.

Verdict for the defendant.

Case of the Horizon.

Mr. *Madison* has written a book to show the *interpolations of the law of nations*, which, he alleged have been committed by *England*, but has entirely failed in substantiating a single instance. We now recommend to his attention a comparison of this decree and decision founded upon it, with the following article in the treaty of 1800 between *France* and the *United States*.

ARTICLE XII.

It shall be lawful for the citizens of either country to sail with their ships and merchandize (contraband goods always excepted) from any port whatever, to any port of the enemy of the other, and to sail and trade with their ships and merchandize, with perfect security and liberty, from the countries, ports and places of those who are enemies of both or of either party, without any opposition or disturbance whatsoever, and to pass not only directly from the ports of the enemy, aforementioned to neutral ports and places, but from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same power, or under several; unless such ports or places shall be *actually* blockaded, besieged or invested.

Nor shall any vessel of either, that may have entered into such port or place before the same was *actually* (or in the *French really*) besieged, blockaded or invested by the other, be restrained from quitting such place with her cargo, nor if found therein after the reduction or surrender of such place, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof.

A TRANSLATION

Of the decision of the imperial council of prizes in the case of the *American* ship the *Horizon*, stranded on the coast of *France*. Under the decree of the 21st *November* 1806.

The imperial council of prizes has rendered the following decision. The papers relative to the affair of the stranding of the *American* ship the *Horizon* being taken into consideration, the result is as follows:

The *American* ship the *Horizon*, belonging to Mr. *John M'Clure* and Mr. *Alexander M'Clure*, brothers, of *Charleston*, cleared out in the month of *September* 1804, under the command of the latter, for *Zanzibar*, on the eastern coast of *Africa*, with a cargo of different kinds of merchandize for account, and risque of these two brothers.

The papers with which this vessel was furnished, were,

1st. A register dated at *Charleston*, on the 3d of *September* 1804, proving the property to belong to the brothers, the *M'Clures*.

2d. A passport from the president of the *United States*, dated on the same day, for the ship *Horizon* going from *Charleston* to the isle of *Zanzibar*.

3d. A *Mediterranean* passport of the same date.

4th. The list or roll of the men composing the crew, signed by the captain and certified by a justice of the peace at *Charleston*, on the 3d. *Sept.* 1804.

5th. The act of engagement of the people composing the crew at the time when the vessel was cast away, and of which the first article is dated on the 20th *Jan.* 1807.

There were besides many papers relative to the cargo, which were perfectly regular.

It appeared by a declaration of captain *M'Clure*, that the *Horizon* went first to *Goree*, where he sold a part of his cargo, which was replaced by articles of that country; that from thence he made sail for the river *De la Plata;* that on the 30th *April* 1804, he was stopped at the entrance of that river by an *English* privateer who released him under an agreement signed by two captains, that the validity or invalidity of the prize should be decided by four merchants of *London;* he then touched at *Buenos Ayres*, where he sold his cargo, and afterwards went to *Monteviedo*, the only port designated for the clearance of foreign vessels; that at this port his ship was freighted by the correspondents of the house *Brentano* and *Virbreta*, to carry to *London* a cargo of merchandize, and that this circumstance determined captain *M'Clure* to give up the

project of going to *Zanzibar;* that towards the end of *September* 1805, the captain left *Monteviedo* in company with the brig *Simon* belonging also to him and his brother, on board of which he put, destined for *London*, the merchandize belonging to their concern, with the exception of some things which he kept on board his own vessel with a sum of about 2200 dollars partly in specie and partly in ingots of gold and silver: that the voyage of the brig *Simon* was fortunate; but that the ship *Horizon* was so much impaired in consequence of bad weather, that she was obliged to put into *Lisbon* to refit; that during her stay in that port captain *M'Clure* succeeded in obtaining from the *Spanish* government a permit to trade in the *Spanish* ports on the pacific ocean; that in consequence he gave an order to purchase on his account at *Lisbon* 100 tons of quicksilver, an article necessary for the working *Spanish* mines in the new world; that the captain hastened to finish his voyage to *London*, with a view of making up the cargo for *Lima*, and coming back to *Lisbon* to take on board his 100 tons of quicksilver; that in consequence he made sail in the month of *June* 1806; but that the *English* frigate *Diana* went out of the port the same day that he did, captured him and carried him to *England*, where, by a decree of the high court of admiralty of the 16th of *September* of the same year, the cargo was confiscated as having been taken (on board) in an enemy's colony and the ship released, as well as the merchandize belonging to captain *M'Clure*. After the captain had obtained the release of his ship, he occupied himself in *England*, in forming a cargo for *Lima*, he was to go back to *Lisbon* to take (on board) there his quicksilver, and to receive there the permit of the *Spanish* government, which had been granted him. The bill of lading of the cargo taken on board at *London*, is dated on the 23d of *May*, 1807; it contains the detail of the merchandize, of which this cargo is composed, and for which no freight is stipulated, inasmuch as it was on account of the captain. The destination is announced to be, for *Lima* and other ports of *Spanish America*.

On the 28th of *May* last the *Horizon* set sail from the *Thames*, she was soon overtaken by a storm, and on the 30th of the same month, she was thrown on the rock called the *Ranneyer* on the coast of *Clouan*, near *Morlaix*, where she was wrecked. The commissary of the marine employed on that part of the coast, having been informed of this event, went to the place to make the necessary inquiries, and to take proper steps to save the property.

On the 1st of *June* the *American* captain was examined, on the 7th of the same month he submitted to a second examination, as well as all the other men of his crew, all their answers concurring to prove that the ship as well as the cargo was really the property of captain *M'Clure* and his brother, both citizens of the *United States*.

The administrators of the marine of *Brest* have by a decision of the 10th of the same month sent to the council to decide on this affair, manifesting an opinion that the imperial decree of *November* 21st, 1806, did not seem necessarily to apply to the case of the *Horizon;* this ship not having touched willingly, but from necessity, on the coasts of *France*.

Two memorials with many papers to support them were produced to the council, under date of —— for the captain *Alexander M'Clure* and *John M'Clure* his brother. They begin by complaining of the pillage which had been committed by a great number of individuals who had gone on board at the time of the stranding of the vessel. It is proved, say they, afterwards, by the papers on board, that the ship and the cargo belong to subjects of the *United States* of *America*, and are not enemy's property, so that from this statement the releasing of the wreck of the ship, and the residue of the cargo could not be susceptible of difficulty. Even the consideration due to the unfortunate has effected the release of vessels, which by stress of weather had been obliged to take refuge in the ports of an enemy. They examine afterwards their case in relation to the decree of the blockade of the *English* ports, of the 21st of *November*. In the first place they have maintained that it could not be applied to *American* vessels, as it contains no

order derogatory to the convention of the 1st of *October*, 1800. Moreover they have said that before leaving *England*, captain *M'Clure* went to consult the ambassador of the *United States*, in *London*, to know if under the regulations of that decree, there would not be danger of being stopped on going to sea with a cargo of merchandize taken on board in *England;* that this ambassador had answered him no, since it followed from an answer given on the 24th *September* by the minister of the marine and of the colonies of the *French* empire to the ambassador of the *United States* at *Paris*, of which the latter had sent him a copy, that this decree placed no other restraint on the navigation of *American* vessels, than that of their not being admitted into the ports of *France*, when they came from the ports of *England* with cargoes taken on board there.

In support of this declaration he has produced a copy of the letter from his excellency, the minister of the marine and of the colonies, of the 24th *September*, which was given to him by the ambassador of the *United States* to the *French* government. This ambassador has added to it at the same time, a letter under the date of the 14th *September*, in which he tells captain *M'Clure* that he had sent a copy of this same letter to the ambassador of the *United States* at *London* to make such use of it as his prudence might suggest. He has added that his excellency the minister of the marine and of the colonies had himself sent a duplicate to the *French* ambassador in *America* to serve as an introduction to the *French* marine in the *West-Indies*, so far as related to the commerce of the *United States*, and that the ambassador had made a communication of it to the government of the *United States*. The conclusion which captain *M'Clure* drew from this letter was, that if the decree of the 21st *November* was applicable to *American* vessels he had been led into an error by means of the *French* government, since the minister of marine could not but be considered as its organ in a diplomatic and ministerial correspondence. Since then having learnt that, from a decision given by his majesty, as to the scope which his decree of the 21st *November* ought to have, it results that it is applicable as well to

American as to all other neutral vessels, he has renewed the plea, that it was the answer of the minister of marine that led him into error; he has said that if it was necessary even in *France* to consult the emperor, as to the way in which the decree of the 21st *November* was to be understood, it could not be a crime in him, a foreigner, not to be more enlightened than the authorities who had asked an interpretation of it. He has contended that it was only from the day of that decision that the decree in question could be made to apply to *American* vessels which should not conform to it in future. Moreover, in observing that it would be impossible under any point of view in which the affair could be considered to confiscate the wreck of his vessel and the parts of the cargo which were saved, that which did not belong to the fabric of *England* nor come from her colonies, he has insisted that the 7th article of this decree does not pronounce against neutral vessels coming from *England* more than a prohibition to their entry into the ports of *France*, and that neither their confiscation nor that of their cargoes is pronounced by the 8th article, save only when they are introduced there by means of a false declaration. Now, said he, it is not in consequence of a false declaration that I have touched on the coast of *France*, it is in consequence of my shipwreck; and it will be a violation of all the laws of equity to confiscate the wreck of my property, making my misfortune a crime.

The brothers, the *M'Clures*, concluded by asking permission to receive the proceeds arising from the sale which may have been legally made of the wrecks of their ship, and of certain things belonging to their cargo, as also the part of the said cargo which had been saved after a deduction of the costs of salvage, with authority in case of the insufficiency of the proceeds of the sale to pay the said costs, to go on to sell so much of the merchandize yet remaining as would do it, under full reservations particularly to prosecute in any form all persons whomsoever for the restitution of the effects which had been illegally taken and embezzled, and to sue for such interest and

damages as could be legally obtained, and generally with a reservation of all rights, exceptions, &c. &c.

Such are the facts and circumstances of the affair.

Upon which, the demand in writing of the imperial attorney general placed this day on the table was taken into consideration, and the report of Mr. *La Coste* member of council was heard.

Considering the neutrality of the ship and of the cargo as being proven agreeably to the requisitions of the convention of the 1st *October*, 1800, there would be good ground to release the whole, was it not found that there was some merchandize (in the cargo) of *English* origin, and consequently within the purview of the imperial decree of the 21st *November* 1806. That it is true that this article in declaring such merchandize good prize had specially in view captures made at sea; but that the question whether property taken from a wreck ought to be restored or confiscated having always been solved under the 14th article of the law of the 26th *July* 1778, according to the character which the capture at sea of that property would have given it, there is no ground to introduce here a new distinction, which, however philanthropic it may seem, has nevertheless not as yet become the usage of any maritime nation. That the application of the 5th article of the before mentioned decree to the *Americans* as to other people results from the general terms of the article and from the communication recently made by his excellency the chief justice the grand judge, relative to the original intention of the sovereign.

As to the rest, the expedition in question having clearly been undertaken after the requisite knowledge of the said decree, no objection can properly be drawn from the general rules, which forbid all retrospective effect, nor even in this particular case from the posteriority of the act by which the sovereign has pronounced on the question: since this act emanates from his supreme wisdom not as an interpretation of a doubtful point; but as a declaration of an anterior and positive order. That if one of the principal agents of his majesty had given a contrary opinion the council has not at any time participated

in it: besides, this opinion being that of an individual cannot, however respectable may be its author, balance the formal declaration given in the name of his majesty himself; and that if the communication of this opinion had encouraged and served as a basis, as is alleged, to many *American* expeditions and particularly to the one in question, this circumstance which might call for the indulgence of his majesty, in a case where the confiscation goes entirely to the benefit of the state, does not release the council from the strict obligation of pronouncing in conformity to the decree of the 21st *November* and to the declaration which has followed it. That as it regards the expense of maintaining the crew, and of the salvage, they ought according to the general rule to be borne by the proprietors, proportionably to the restitution which will be made to them; but as it is certain on the one hand that the men belonging to the ship have been retained under the authority of the government, and on the other that at the time of the shipwreck a considerable pillage was committed, in consequence of which there has been instituted a criminal prosecution the result of which, it is extremely probable, will not completely indemnify the proprietors for the loss they sustained of merchandize not liable to seizure, and as this circumstance is of a nature to exempt them from all contribution other than that of the sale, the council releases the *American* ship the *Horizon* stranded on the 30th *June* last near *Morlaix*, and in consequence orders that the proceeds of the sale legally made of the wreck of the said ship together with the merchandize of the cargo, which, after an examination made in the presence of the agents of the administrators of the marine and of the custom-house, shall be known not to have come either from the *English* manufactories or the territories of *England*, shall be restored to captain *M'Clure* without a deduction of other expenses than those relating to the sale. And with respect to the other merchandize of the cargo which from the result of the said examination shall be known to have come from the *English* manufactories or territory, these it has confiscated for the profit of the state, by virtue of the 5th article of the de-

cree of the 21st *November* 1806; the whole to be sold under the forms prescribed by law, and the application of the proceeds to be made in conformity to the dispositions of the said decree, a deduction being made of all the costs of salvage and of those of maintaining the crew to the time when a notification shall be made to the captain of the present decision.

Done at the imperial council of prizes, sitting at *Paris*, this 16th of *October* 1807.

(Signed) BERLIER, President.
LA COSTE, Reporter.

COUNCIL OF STATE.

Napoleon, emperor of the *French*, king of *Italy* and protector of the confederation of the Rhine.

Upon the report of our commission of controversies.

Having seen the plea set up by Mr. *Alexander M'Clure* an *American* captain and proprietor of the ship *Horizon* and of the cargo on board, in the council of prizes of the 16th of last *October*, tending to annul the said decision, as to that part of the merchandize which is recognized as the growth or manufacture of the *British* isles;

The memoir produced in support of the plea;

The decision of the said council of the 18th *September*; and

The advice of our commission of controversies:

Considering that the spirit and letter of the imperial decree of the 21st of *November*, 1806, ordain without distinction and in an unqualified manner the confiscation of all goods the produce of the soil or manufactures of *Great Britain*, and that in applying it in this sense to the cargo of the *American* ship *Horizon*, our imperial council has conformed to the provisions of the said decree:

Our council of state being heard;

We have decreed, and do decree as follows:

The plea of the *American* captain, *Alexander M'Clure*, against the decision of our imperial council of prizes of the 16th of *October*, 1807, is rejected.

Approved, in our palace of the *Thuilleries*, the 19th of *March*, 1808.

(Signed) NAPOLEON.

By the emperor.

The secretary of state,

(Signed) HUGES B. MARET.

Delivered by us,

secretary general of the

council of state.

(Signed) J. G. LOIRE.

An abstract of the Attachment Law of South Carolina,

ENACTED MAY 29, 1744.

THIS act is not agreeable to common law rules, but is in toto, bottomed on the principles of the civil law,* see *Clerk's Practice* of the ecclesiastical and admiralty courts from page 45 to 58 inclusive. *Clerk's Practice* 45.

An act for the better securing the payment and more easy recovery of debts, due from *any person* or persons inhabiting,

[* The editor apprehends that his correspondent is under a mistake, in deriving the law of attachments from the civil law. According to *Huberus, de vocando in jus*, it is a remedy not warranted by the civil law. That the principle upon which these laws are founded was not unknown to that venerable code we may learn from one of the maxims of Justinian: *debitor creditoris est debitor creditori creditoris;* but it is believed that no instance of such a mode of proceeding can be found in the books of the civilians.

The writer has probably been misled by the book which he cites. I have not a copy of *Clerk's Practice* in the ecclesiastical and admiralty which is cited above, but from his *Praxis supremæ curiæ admiralitatis*, it appears that attachments were formerly regarded as within the jurisdiction of the courts of admiralty; now, however, as we find by *Brown's civil law*, the practice is discontinued. This subject shall be treated more at large in a future number.]

residing or being beyond the *seas*, or elsewhere without the *limits of this state*, by attaching the monies, goods, chattels, debts and books of account of such person or *persons*, *if any* he, she or they shall *have* within this *province*, and to empower and enable a feme covert to sue for and recover such debts as shall be contracted with her as a sole trader, and to subject such feme covert to be arrested and sued, for any debts contracted by her as a sole trader.

Any person may sue out writs of attachment against any other out of the limits of the state.

The person first suing out the attachment is to be preferred *Clerk's Practice* 65.

Attaching any part of the goods &c. makes the whole liable for plaintiff's debt.

Provost marshal to summon the person in whose hands the goods of the absent debtor are, by leaving a copy of the writ with notice to appear &c.

If no person be present at the time of attaching goods by provost marshal copy of writs to be fixed up at prison door and notice to be given in the gazette.

Persons summoned to make returns on oath, at the return of writ, but corporate bodies make return under their corporate seal, *vid post*, *Callahan* v. *Hallowell*, or at farthest during the sitting of court of common pleas next after.

And in case of not appearing and discovering on oath, judgment to be given by default and execution to issue.

In case goods and chattels be seized and taken into custody by provost marshal, and no person appears to claim, at return of writ, the same to be adjudged property of the absent debtor.

But if claimants shall appear at the return and lay claim and upon oath deny they are the property of absent debtor &c. their attachment to be dissolved.

But if plaintiff do not rest satisfied with claimants' oath he is put to plead the same and the matter is tried by jury.

Plaintiff suing out attachment to declare in two months unless good cause shown for further time &c.

And to serve copy of declaration on absent debtor's wife or attorney with rule to plead &c. if any be in the state.

But if absent debtor hath no wife nor attorney in the state, then notice to be published once every month for twelve months before final and absolute judgment.

Goods, chattels &c. on filing declaration to be delivered over to plaintiff, being first inventoried and appraised and recognizance entered into in double the sum to prosecute suit; and that the sum shall be forthcoming in case defendant appears and disproves debts &c.

Plaintiff to sue for and recover notes, bonds &c. assigned over in the name of absent debtor.

Plaintiff on filing declaration to swear to his debt that no part has been paid, and that he does not in any manner stand indebted to defendant.

Persons in whose hands goods &c. are attached, allowed to retain in the first place for their debts &c. but it is necessary that they forthwith file their declaration as if they were plaintiffs in the attachment.

Senior associate justice, or either of the associate justices may grant order for selling property attached &c. Provost marshal to give twenty days' notice of sale &c.

Absent debtor or his attorney at any time within a year and day may dissolve attachment on filing special bail &c. In which case goods &c. to be delivered over to him &c.

If absent debtor, at any time within two years, disprove the demand set up by plaintiff, he shall recover all damages and treble costs of suit, &c.

If any person who is about to leave the state give one month's previous notice of his intention no attachment will lie against him.

Femes covert *being sole* traders liable to be sued and arrested for debts contracted by them as such, and may sue for and recover debts &c.

N. B. All *persons concealing themselves* in this state so that *no process can be served on them*, to be proceeded against

under the foregoing act, as if they had actually absconded out of the state.

14 *Section. Insolvent debtors' law.*

By an act for amending the above act, land, leasehold estates and chattels real are liable to be attached &c. and the whole are made responsible for any torts trespass or injury done by absentee, as well as for debts due by him &c. act passed 12th *March* 1783.

This act further amended. See 5th 6th and 7th clauses of county court law passed in 1785, also by an act passed in *February* 1788, giving same power to district courts as are given to county courts and county justices.

Court of Common Pleas.

CHARLESTON October, 1795.

Callahan *v.* Hallowell.
Lenox *v.* Same.

ATTACHMENTS. The first attachment lodged in the sheriff's office is entitled to a preference.

All returns on the part of the corporation, to be made by the Intendant under corporation seal; and not on oath.

THESE were two cases on the attachment act against the effects of the absent debtor, in a store he had rented from the corporation.

And the point submitted to the court was, which of these defendants should have the preference.

It was admitted that *Callahan's* attachment was lodged in the sheriff's office about one minute before *Lenox's*, but that the sheriff's officer served a copy of *Lenox's* attachment on Mr. *M'Call* the city treasurer, who then had the charge of the

store on behalf of the corporation before *Callahan's* was served, and the point was, which of the parties should have the preference; and for that purpose the officers of the corporation wished for the opinion of the court, in order that the return to the writs of attachment might be made accordingly.

The court upon consultation was of opinion that the sheriffs office being a public office, and the place where all writs and processes are entered before service, *that the first attachment entered there ought to have the first lien on the goods*, and that it was the duty of the sheriff to serve that first; otherwise it might be in the power of the sheriff, to vary the right of the parties, as he pleased, by serving any one he thought proper first.

Where priority of action becomes essential, the particular day must be shown, and although the law in general allows of no fractions in days, yet it admits it, where it is necessary to distinguish who has the priority, as in *qui tam* actions the very hour may be shown. 3 *Burr.* 1426.

If then the very hour may be shown, there is no drawing the line but by priority, the very minute may be shown upon the same principle, and that must govern; and the writ is considered as the commencement of the suit, and the delivery to the sheriff, *the time of commencement.* 3 *Burr.* 1421. Time being therefore in its nature divisible from years down to days and minutes, a minute will give a priority as essentially in point of time as a year or a day. They were therefore of opinion that *Callahan* had the preference.

N. B. Some of the gentlemen of the bar seemed to think this determination of great consequence to the practice of the court, and therefore wished it to have a more solemn argument; to which the court most readily assented, but it was never after brought forward.

Mr. *Holmes*, the intendant of the city of *Charleston* then suggested to the court, that doubts had arisen about the mode and manner in which these kinds of returns ought to be made on behalf of the corporation, suggesting at the same time that the city had a claim on the goods attached for rent.

Whereupon the court was of opinion, that all returns whatever on behalf of the corporation, ought to be made by the *intendant*, who is at the head of it; *under the corporation seal;* and that as the city seal proved itself, an oath was unnecessary, as a corporate body could not take an oath, and that being in possession they had a right to retain the goods for rent, the remainder to be sold for the attaching creditors according to priority.

Justices present,

*Burke, Waties, Bay.**

The Laws of Maryland relative to Bonds.

THE rate of interest on pecuniary loans established by law in this state is six per cent. Where the loan is of tobacco, wares, merchandizes or other commodities, and it is to be repaid in tobacco or other commodities, eight per cent may be taken. All bonds, contracts and assurances whatsoever, by which a greater interest is reserved than these rates are absolutely void, and in all cases, where such usury appears, no matter by what ways and means of corrupt bargain, whether by loan, exchange, chievezance, shift or interest, the party forfeits treble the value of the money or goods, one half "to our sovereign lady the queen," as the law anciently stood, but now to the state, the other to him who shall sue for it.

Bonds given in cases of appeal are for double the sum recovered by the judgment from which the appeal is made. The condition is that the party shall pursue the directions of the act respecting appeals, at the next court ensuing, before which the appeal or writ of error ought to be tried, and satisfy the plaintiff, in his damages and costs, if the judgment be affirmed.†

* From judge *Bay's Reports*, MS.

† Debt on an appeal bond to the court of appeals. Judgment in the county court of *Baltimore* on a verdict in an action of assault and battery, removed

In all cases of bonds or other agreements, for the conveyance of land, or of any other contract or agreement whatsoever, where the land or matter in dispute does not exceed the value of one hundred pounds or ten thousand pounds of tobacco, the county courts are invested with the same original equity jurisdiction for the purpose of compelling a specific performance, which the chancellor exercises in similar cases. If the party considers himself aggrieved by the decree of the county court, he may appeal to the chancellor, provided the demand exceed thirty pounds or three thousand pounds of tobacco. Where the party applies to the equity side of its jurisdiction, he must give a bond, in such sum as the court may approve, conditioned for the payment of whatever may appear to be due to the adverse party.

Executors and administrators are required to return a full account of their administration, within fifteen or, under permission from the court, eighteen calendar months from the date of the letters. At the expiration of this time any legatee or person entitled to the residue of the estate may sue for such legacy or residuary part, and recover out of the full estate, in the same manner as if there were no further disbursements for debts or charges to be made. The plaintiff however is obliged to give security to refund to the executor or administrator according to the statute 23 *C.* 2. *chap.* 10. Where it becomes necessary to bring an action on a testamentary bond, or bond for the faithful administration of an

to the general court by writ of error and affirmed with interest or damages: same in the court of appeals.

The plaintiff contended that every judgment carried interest, and that it was a breach of the writ of error bond, not to pay it.

The defendant denied both these positions. Judgment does not, at common law, *ex consequente* carry interest. The plaintiff ought to have brought an action of debt on the judgment for it. Courts of appeal may assess damages for interest or rather interest in damages.

Per curiam. No interest can be recoved except from the time of affirmance in the court of appeals. The non-payment of their judgment is a breach of the condition of this appeal bond and covered by the penalty of it. *Vid.* 2 *T. R.* 51. *Ex* MSS. Judge *Sprigg*, decided *May*, 1804.

estate, the courts of law are required to proceed to judgment and execution, without taking notice of any injunction or other chancery proceeding to delay the case, unless the party obtains a final decree, or full hearing, or running out the process for the awarding of such a writ. But this law does not prevent any person from proceeding in chancery, if he conceive himself to be properly relievable in equity

It is not lawful for any creditor to bring suit upon testamentary bond for any debt or damages due from or recovered against a testator or intestate or his effects, until there has previously been issued a writ of *capias ad respondendum* upon which the sheriff has returned *non est inventus*, or a writ of *fieri facias* returned *nulla bona*. If such other apparent insolvency or insufficiency of the person or effects, as renders the creditor remediless by any other reasonable means, be made appear to the court, they will sustain the suit, without requiring either of these writs to be issued.

In order to prevent the practice of issuing executions *for* the whole penalties contained *in* certain bonds, it is provided that no judgment can be obtained upon a testamentary or sheriff's bond, until the creditor clearly makes appear to the court what his demand is; which is proved in this manner: the defendant must have notice, served upon him or left at his last place of abode, twenty days before the sitting of the court in which the plaintiff means to apply for an assessment of his demand. A copy of the demand attested by the clerk must be sent with the notice. The court being satisfied that this has been done will then assess the damages or appoint auditors to adjust the demand, and then give judgment in the usual manner; but an execution can only be issued for such sum as appears to be actually due, unless one of the parties pray a writ of inquiry. In such a case the writ is granted, and proceeded in according to the directions of the act of parliament 8 and 9 *W.* 3. entitled, *an act for the better preventing frivolous* and *vexatious suits*. The execution then issues only for such sum as may be found by the jury, with costs and interest until payment is made or tendered.

When a judgment has been obtained on such a bond no other creditor can avail himself of it, without sending a *scire facias* to be sued, which writ must specify the nature of the the demand and the sum due and be sued within eighteen months after such recovery.

When an application is made to the chancery court by an executor or administrator for a writ of error to remove a cause, the chancellor has the power to prescribe the penalty of the appeal bond: so also with regard to all applications for injunctions to stay proceedings at law. To remedy the inconvenience to which suitors were subjected, by being obliged to go to *Annapolis*, with their sureties, to enter into bond in the chancery office, on application for an injunction, the power of taking security for the due prosecution of writs of injunction, has been extended to the county courts. Bonds so taken operate as a *supersedeas* until the appellee obtains a certificate from the chancellor or his register, of the disallowance of an injunction in the case, or that such an injunction has not been sued out of the chancery office within two months after the bond has been given, or, if sued out, that it is dissolved.

All bonds, bills or other writings obligatory taken by a sheriff or deputy must be indorsed with a statement of the consideration upon which it was passed, or it is void: so too, if they be taken by an attorney or clerk of a county court.

It is not lawful for any attorney or other person whatsoever, to confess a judgment, either in court or before one or more of the justices out of court, by virtue of a power of attorney, contained in bonds, commonly called judgment bonds. But the chief justice or either of the associate justices may out of court direct the clerk to enter judgment by confession or by *non sum informatus*, which are as legal as if the court were in session.

No assignment, assurance, conveyance, deed or any other writing whatsoever of any goods, chattels, effects, debts, lands, tenements or hereditaments executed by a person trading to this state and residing out of it, at the time, can be of any force until the person to whom it is made or his agent or

attorney shall give bond, with such security as may be approved by the chancellor, to satisfy every debt which is due, at that time from the person executing, to any person residing within the state, so far as the goods &c. shall come to the hands of such obligor. This bond cannot be sued after the debt or thing in action shall be above three years' standing: saving to all persons under the impediments of infancy, coverture, insanity of mind, imprisonment or beyond sea, the full benefit of such bonds for the space of three years after the disability is removed.

Where any person is bound in a bond or has indorsed a bill of exchange and is obliged to pay the money, the obligee or indorsee may be compelled to assign it over to him, and the surety or indorser may have an action in his own name against the principal debtor. So too, a judgment must be assigned, where it has been paid by the surety; and he is entitled to execution against his principal for the whole, or against his cosureties, if there be any, for a proportionable part. But the defendant is not precluded from his remedy against the plaintiff by *audita querela*, or other equitable proceeding.

Upon all obligations under seal, which are assigned under seal, the assignee may maintain an action in his own name against the obligor; and if the obligor be unable to pay the debt, or cannot be found in the place of his usual abode, or the plaintiff be prevented by any other means than his own negligence or default from recovering the money, he may have his action against the obligee. But this action against the obligee, in default of the obligor, cannot be maintaind unless the assignor have made oath before some magistrate "that he hath or have received no part of the sum mentioned in such obligation, or but such part thereof as shall be mentioned in such oath, at time of making such assignment," to be indorsed on the obligation.

Where an application is made to the high court of chancery for the foreclosure of a mortgage or sale of land, in which an infant is interested, the petitioner must give bond, with sufficient security, to be approved by the chancellor, to the infant, his heirs, executors and administrators, with this condition:

that in case the infant within one year after his arrival to age shall make appear to the satisfaction of the chancellor that there was fraud in obtaining the mortgage deed, or that no deed was really executed, or that the debt claimed, or so much as was decreed to be paid, was not due, that then the obligor, his heirs &c. will reconvey the mortgaged premises to the infant, or, in case of sale, will pay to the infant the whole or such part of the sum raised as the chancellor may determine to be just, and will also abide by such order and decree as may be made in the cause. Suit may be maintained upon this bond or upon a copy of the record, when the condition is broken and the plea of *non est factum* cannot be received unless verified by the oath of the defendant. The same rule as to pleading prevails in actions on bonds given by commissioners to sell lands &c. by order of the chancellor.

Where a trustee is appointed by will to execute a trust, and any person interested in the execution of such trust makes it appear to the chancellor, that it is necessary for the safety of those who are interested, that the trustee should give a bond for the faithful performance of the trust, the chancellor may give direction accordingly. If the bond be not filed by the day assigned, the chancellor may displace the trustee and appoint another. *The plea of non est factum* is not permitted in any action, unless it be verified on oath by the party so pleading, or unless the defendant, being the heir, executor or administrator of the person by whom the deed is alleged to have been made, obtain leave from the court to put in such plea.

In all actions brought for the penalty of any bond, bill, covenant or contract with a penalty, the jury may, under the direction of the court, upon the plea of payment or performance of the condition, ascertain what sum is really due to the plaintiff. The judgment is then to be entered for the penalty, to be released upon payment of the sum so found, with interest until payment and costs of suit.

A copy of the record of any instrument of writing, which the laws of the state or country where it was executed require to be recorded, and which has been recorded agreeably to those

laws, is admitted in the courts of this state as good and sufficient evidence, if it be under the hand of the keeper of such record and the seal of the court or office in whichit has been made. If it be only lodged for safe keeping, according to the laws of the place where it was executed, a copy certified in this manner is sufficient.

Where recording is not necessary to give validity to an instrument, by the laws of the country in which it has been executed, proof of the execution, by the oath of any of the subscribing witnesses, taken before any court, judge or justice, or other officer of the same country, who has authority by law to administer an oath, and a certificate under seal from the governor, chief magistrate or a notary public of the country that the court or officer has such authority, and that the oath has been duly made before such court or officer, is sufficient. If all the subscribing witnesses are dead, proof of their handwriting certified in the same manner is admitted.

But where it is intended to introduce such testimony, the plaintiff must make oath before a judge or justice of this state, or, as above, before a court &c. of another state or country, that the instrument was duly executed, and that the debt appearing to be due is not paid or in any manner satisfied, by discount, account in bar or otherwise, to the knowledge or belief of the deponent, but that such part as is stated to be due remains unpaid, according to the best of the knowledge and belief of the deponent. This act does not alter the manner of conveying lands within this state by persons residing out of it,* nor of proving accounts against the estates of deceased persons. In order to authenticate such a claim, if it arise on a specialty, bond, note or protested bill of exchange, the voucher is the instrument itself, or a proved copy in case it be lost, with a certificate of the oath made since the death and indorsed upon or annexed to the instrument a statement of the claim, " that no part of the money intended to be secured by

* *Vid.* American Law Journal, No. I. p. 92.

such instrument hath been received, or any security or satisfaction given for the same, except what (if any) is credited."

If the creditor on such instrument be an assignee, there must be the same oath of the original creditor, with respect to the time of the assignment, and of the intermediate assignees, if there have been any. If the dealing has been with a factor and the principal be not within the state, the factor who took the bond, note &c. or who sold or delivered the articles may make oath, to be certified and indorsed as before, "that the said statement is full, just and true, and that he (the deponent) took the said bond (or note &c. or delivered &c.) as factor to—living in (or lately of— ;) that neither he (the deponent) nor the principal nor any other person for him, *or the principal* to his knowledge or belief, hath received any part of the money originally due on such bond &c. or any security or satisfaction for the same, except what (if any) is credited."

LIMITATIONS.

Bonds (except to the state) are not good and pleadable after the principal debtor and creditor have both been dead twelve years, or the debt or thing in action is above twelve years' standing. But there is a saving to infants, those under the disability of coverture, insanity, imprisonment or beyond sea, of five years after the disability is removed. Actions on sheriffs' bonds must be commenced in five years after the term of office has expired; the *state* may sue at any time, and infants &c. within five years after the disability &c.

Testamentary bonds must be sued within twelve years from their date.

The following brief notes of cases decided in the late general court of this state are copied from the MS. note book of the late judge *Sprigg* who presided in that court, until a short time before it was abolished.

GENERAL COURT.

Jeremiah T. Chase, Chief Judge,

John Done, *Richard Sprigg* } Judges.

Dixon Slade et ux. *v.* Robert Morgan.

May 1803. Action of debt on a testamentary bond. General Performance, Replication, Rejoinder, No assets, and Payment, &c.

It was contended, for the plaintiffs, that on the plea, the proof lay on the defendant, that he had legally discharged himself from the claim; and *Swinb.* 420. 14. *Vin.* 466. title "*Inventory*," were cited, that a legatee shall recover against an executor who has returned no inventory.

For the defendant, his counsel urged that the proof of assets lay on the plaintiff, whether he was a legatee or distributee, and that the defendant could not be put to prove a negative. The direction of the court was prayed, that before the plaintiff could recover in this action, he must prove assets in the defendant's hands, which direction the court refused to give.

The defendant then offered to prove that nothing came to his hands but evidences of debts, which were afterwards paid off to him in continental money, but

Per cur. This evidence is inadmissible.

Under the plea of *payment*, the defendant's account of payments made by him was admitted, and if proved, would have been received by order of the court.

Verdict for the plaintiff. *Martin* for the plantiffs, *Hollingsworth* and *Johnson* for the defendant.

Beal *v.* Beal et al. admrs. of a surety in a testamentary bond.

May 1803. Debt on a testamentary bond. Performance and Limitations, Replications and Rejoinders, Payment, &c.

This action was brought to recover a distributive share after the payment of debts. No account was settled in the orphan's

court by the executrix. Other evidence was admitted by the court of payment of debts by her. The defendants offered a copy of a judgment against *Sarah Beal*, not against *Sarah Beal* executrix, and parol evidence that it was the debt of the testator. To this the plaintiff objected, inasmuch as there is not the evidence at that time necessary in the orphan's court.

Per cur. Parol evidence that the testator owed a sum of money which the executrix has since paid is admissible: the admission of the executrix on which judgment may have been entered in a court of law *in her own name* is not evidence against her.

Shaaff & *Johnson* for the plaintiff, *Mason* for the defendants.

Verdict for the defendants.

Juridical Opinions.

A. B. effected insurance on brig —— vessel, cargo and freight, at and from *Gaudaloupe* to *New-York*, warranting the same to be *American* property.

The brig sailed from *Gaudaloupe* on the 22d *January* last, on the same day she carried away one of her topmasts and stays and bore to leeward of *Montserat;* was captured by a *British* privateer and carried into that island, when, after lying some time she parted her cables and drove to sea, was then carried into *St. Kitts* being still in possession of the privateersmen.

On the 18th *March* she was tried at *Antigua* and acquitted on payment of costs, port charges &c. to the amount of 500*l.* that currency, for which the captain was under the necessity of giving a bottomry on brig and cargo. The brig with her cargo consisting chiefly of molasses arrived in *New-York* on the 27th *April*, part of the cargo had become during the detention damaged.

On the 2d of *April* A. B. tendered an abandonment of the vessel, freight and cargo to the insurers.

On the arrival of the vessel at *New-York*, the assurers were informed of it and applied to for direction respecting the property; they declined giving any, but gave permission to the assured to dispose of vessel and cargo to the best advantage without prejudice to his claim under the abandonment. A sale of the cargo was accordingly made, but the vessel could not be sold, on account of the bottomry bond remaining in force, and she now lies at *New-York* subject thereto.

The underwriters refuse to accept the abandonment. Has A. B. a claim for a *total loss* under the abandonment, or only for an average or partial loss?

NEUTRAL TRADE.

To —— —— Philadelphia.

London, 26th *November* 1805.

Gentlemen,

AS the present system of our government, relative to the capture and condemnation of neutrals having on board the produce of the enemy's colonies, is become a subject of the greatest importance to the commercial world in general, and to *American* citizens in particular, and presuming it may not be uninteresting to yourselves, we take the liberty to hand you on the other side, a copy of a case drawn for the purpose of procuring the best information as to the conduct now to be adopted by neutrals engaged in such adventure, together with the opinion of one of the most eminent civilians in the admiralty courts. We are &c.

CASE. A. and B. merchants at *New-York*, subjects and citizens of the *United States* of *America*, and extensively connected with the continent of *Europe*, from the different quarters of which they learn that the produce of the enemy's colonies is selling at high prices, and on contrasting them with those of *New-York*, they find sufficient margin for successful adventure; in consequence of which, they determine on shipping a cargo of *Havanna* and *Martinique* sugars and coffee,

Carraccas cocoa, log and *Nicaragua* wood to the port of *Leghorn;* and in pursuance of this scheme, they attend the public sales and examine the private warehouses of individuals, where they succeed in purchasing so much as is deemed advisable of each of the above articles, partly at public, partly by private sale; bills of parcels for which are tendered by the sellers, who accompanying the purchasers to a magistrate, before whom the latter, as well as the former, make oath to the fact of such purchases, and the particulars as stated in the bills of parcels, which oath is countersigned by the *English*, *French*, *Spanish* and such other consuls whose signatures may be deemed needful. For the transport of this property, an *American* vessel is chartered, on board of which it is shipt; and the vessel proceeds on the intended voyage, furnished with the regular documents to establish the neutrality of her flag; the captain is also provided with the aforesaid authenticated bills of parcels, together with bills of lading in conformity, and the certificate of the citizenship of A. and B. also of their ownership of said cargo.

Quere. Can such vessel, on such voyage to *Leghorn*, be legally detained by *British* cruisers? and if detained, is either vessel or cargo, or any part thereof, subject to condemnation? likewise what would be the situation of this vessel and cargo, if bound direct to an enemy's port, say *Amsterdam*, *Bordeaux* or *Cadiz?*

OPINION.

If the transaction be truly as here stated, so that it be a speculation essentially originating in *America*, for a voyage actually commencing there, neither vessel nor cargo nor any part of such cargo would be subject to condemnation, whether destined to *Leghorn*, *Amsterdam*, *Bordeaux*, *Cadiz*, or any other port, neutral or hostile, in *Europe;* a detention however, may be legal, where the result may not be condemnation; what would justify detention can hardly be defined in answering a supposed case, because it must depend on a view of all the evidence taken together, both oral and documentary.

(Signed) F. LAURENCE.

London, November 19, 1805.

Vice Admiralty Court of Antigua.

THE schooner *Washington*, belonging to Mr. *Soulic* of *New Orleans*, taken on her voyage from *Bordeaux* to *Orleans*, and sent into *Antigua*.

Decree of Judge Byram.

Mr. *Soulic's* right and property in the vessel and cargo as an *American* citizen, resting altogether upon his residence at *New Orleans* from the date of the session of *Louisiana* by the government of *France* to the *United States* of *America*, it remains to be determined whether a native subject of *France*, who, when *Louisiana* belonged to *Spain*, was a subject of that kingdom, and when it was ceded to *France* became a *French* subject, and in both characters trading to and from the countries of the enemy of *Great Britain*, shall be, at once by the sale of *Louisiana* to *America*, considered as an *American* citizen and entitled to the rights of neutrality. That is too much for this court to say, and is a question only to be decided by a superior tribunal. Considering therefore the vessel and cargo as the property of *French* subjects, &c. I do order, adjudge and decree, and it is hereby ordered, adjudged and decreed, as the definitive sentence of this honourable court, that the said schooner *Washington* and her cargo or lading (except such part as belongs to the master and ——— which is hereby ordered to be restored) be and the same are hereby condemned as good and lawful prize to his majesty's ships *Hippomenes*, whereof *Edward Wolcombe*, esq. is commander, and *L'Hereux*, whereof *George Younghusband*, esq. is commander, and to be delivered to their agent or agents, accordingly be divided, &c.

Antigua, December 5th 1805.

OPINION OF WILLIAM PINKNEY, ESQ.

On the will of —— and on the right of —— his wife, to a third of his personal estate.

THE will bequeaths no part of his personal estate to his wife, but, on the contrary, bequeaths it all away from her, and she did not renounce the will.

It is required, whether, under these circumstances, she is entitled to a *third of the personal estate, clear of debts.*

I am of opinion, that she is so entitled, and as the point is an important one I will state my reasons at large. It has for many years past (and I believe from the first settlement of the province, but certainly ever since the act of 1715, *ch.* 39.) been the prevailing idea in this country, among lawyers as well as others, that a husband could not devise away the whole of his personal estate from his wife. This idea has been almost (if not perfectly) universal, and it is supposed to have originated entirely from the provisions of the act of 1715. I think it did not take its rise solely from that act; but let its origin have been what it might, it has been received as settled and established law, and has, in part, been recognized by our testamentary tribunals. Whether it is a just idea or otherwise will not be discovered by a mere examination of the act of 1715; for although in the passage of that act the general assembly evidently considered it as a rule of law that the wife could not be debarred of her third part by the last will of her husband, yet, as there is nothing in the act which actually provides to the full extent of the rule, or establishes it in so many words beyond certain specified instances, the rule, as it has been since understood, could not probably have been derived from that act alone. It appears to me that it was part of the law of *Maryland before that act was in existence;* for, if it was not, it is inconceivable that the fact of the general assembly having mistaken the law should have totally changed it without any legislative provision sufficiently extensive to do so. The provisions of the act of

Vice Admiralty Court of Antigua.

THE schooner *Washington*, belonging to Mr. *Soulic* of *New Orleans*, taken on her voyage from *Bordeaux* to *Orleans*, and sent into *Antigua*.

Decree of Judge Byram.

Mr. *Soulic's* right and property in the vessel and cargo as an *American* citizen, resting altogether upon his residence at *New Orleans* from the date of the session of *Louisiana* by the government of *France* to the *United States* of *America*, it remains to be determined whether a native subject of *France*, who, when *Louisiana* belonged to *Spain*, was a subject of that kingdom, and when it was ceded to *France* became a *French* subject, and in both characters trading to and from the countries of the enemy of *Great Britain*, shall be, at once by the sale of *Louisiana* to *America*, considered as an *American* citizen and entitled to the rights of neutrality. That is too much for this court to say, and is a question only to be decided by a superior tribunal. Considering therefore the vessel and cargo as the property of *French* subjects, &c. I do order, adjudge and decree, and it is hereby ordered, adjudged and decreed, as the definitive sentence of this honourable court, that the said schooner *Washington* and her cargo or lading (except such part as belongs to the master and ——— which is hereby ordered to be restored) be and the same are hereby condemned as good and lawful prize to his majesty's ships *Hippomenes*, whereof *Edward Wolcombe*, esq. is commander, and *L'Hereux*, whereof *George Younghusband*, esq. is commander, and to be delivered to their agent or agents, accordingly be divided, &c.

Antigua, December 5th 1805.

OPINION OF WILLIAM PINKNEY, ESQ.

On the will of —— and on the right of —— his wife, to a third of his personal estate.

THE will bequeaths no part of his personal estate to his wife, but, on the contrary, bequeaths it all away from her, and she did not renounce the will.

It is required, whether, under these circumstances, she is entitled to a *third of the personal estate, clear of debts.*

I am of opinion, that she is so entitled, and as the point is an important one I will state my reasons at large. It has for many years past (and I believe from the first settlement of the province, but certainly ever since the act of 1715, *ch.* 39.) been the prevailing idea in this country, among lawyers as well as others, that a husband could not devise away the whole of his personal estate from his wife. This idea has been almost (if not perfectly) universal, and it is supposed to have originated entirely from the provisions of the act of 1715. I think it did not take its rise solely from that act; but let its origin have been what it might, it has been received as settled and established law, and has, in part, been recognized by our testamentary tribunals. Whether it is a just idea or otherwise will not be discovered by a mere examination of the act of 1715; for although in the passage of that act the general assembly evidently considered it as a rule of law that the wife could not be debarred of her third part by the last will of her husband, yet, as there is nothing in the act which actually provides to the full extent of the rule, or establishes it in so many words beyond certain specified instances, the rule, as it has been since understood, could not probably have been derived from that act alone. It appears to me that it was part of the law of *Maryland before that act was in existence;* for, if it was not, it is inconceivable that the fact of the general assembly having mistaken the law should have totally changed it without any legislative provision sufficiently extensive to do so. The provisions of the act of

1715 apply only to a single case, i. e. where the husband bequeaths a considerable part of his personal estate to his wife and she renounces (vide act 1729) within forty days. In this case she is declared to be entitled to one *full* third of the *clear* personal estate; which expressions unquestionably mean a full third *clear of debts*, (vide the whole clause and the proviso about debts.) But this act goes no further; it does not enact the general rule before mentioned, although it certainly acts upon it as applying to the instance for which it was making provision. The reason why it did not enact to the full extent of the general rule was evidently this, that the assembly considered that rule as being already the law of the land. Their object was rather to *limit its operation* than to *establish it*; their view was to prevent a consequence from it which they considered as unjust, and not to introduce it; they believed it to have been introduced before, and to have been the undoubted law of *Maryland*, (vide preamble of the clause.) In this belief, I think, they were not mistaken; but whether they were mistaken or not, it is extremely clear to me that their opinion concurred with the received and settled doctrine and practice at that time. How that doctrine came to be received will appear from the history of some parts of the *English* law, which I will state from the 2d *vol.* of *Blackstone's Commentaries*, p. 494, 495, 496. By the common law of *England*, as it stood in the reign of *Henry* II. the personal estate was to be divided into three equal parts, of which one went to the heirs or lineal descendants, another to his wife, and the third was at his own disposal, &c. "The shares of the wife and children were called their *reasonable parts*, which the husband could not devise away from them, and a writ was given to recover them." This continued to be the law of the land at the time of magna charta, &c. In the reign of *Edward* III. this right of the wife and children was still held to be the universal or common law, "and sir *Henry Finch* lays it down expressly *in the reign of Charles* I. to be the general law of the land. But this law is at present (in *England*) altered by imperceptible degrees (not by statute); and the deceased may now

by will bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration began." The same author remarks that the old rule continues to be the law of *Scotland* to this day, and that it also continued in *Wales*, the province of *York*, and city of *London*, till very modern times, when it was altered by different statutes, passed in the reigns of *William* and *Mary*, *Queen Anne* and *George* I. vide p. 497. It will appear from the above statement that in the reign of *Charles* I. the widow was entitled to the third of her husband's personal estate by the common law, and that he could not devise it away from her. The charter of *Maryland* bears date in the eighth year of that king's reign, and colonization commenced about the same period. It follows that the emigrants to this country brought the then established law along with them, and received and acted upon it here as a rule of property. From colonization to the act of 1715 the rule remained unchanged in this country, although in *England* it was undergoing gradual alterations; and in 1715 the provincial legislature expressly recognize it as settled law, and proceed to limit its effects in the case already mentioned. It is true, indeed, that the colonists did not adopt the whole of the ancient rule, for they do not seem to have acknowledged *the right of the children*, but that they adopted and practised the rule so far as it respected *the wife* is extremely obvious. The change of the law in *England* could have no influence upon it here; it was not changed by an act of parliament or suddenly changed; —it altered imperceptibly and silently. The colonists, being far removed from the mother country, either did not know of this change, or did not choose to follow it; and it is clear that they were not bound to follow it. On the contrary the colonial assembly recognize the rule and legislate upon it; for it is impossible to think that the act of 1715 is not founded upon the admission of this rule, merely calculated to restrict its influence on a particular case. Upon the whole it occurs to me that this right of the wife to a third part of the husband's personal estate, in opposition to his last will and testament, was the law of *England* at the time of our colonization; that the colonists

brought this law with them, received it, and acted upon it until 1715, when (although it needed no ratification) it was confirmed by the opinion and provisions of the legislature. The passage cited from *Blackstone's Commentaries*, coupled with the act of 1715, is satisfactory to my mind. Upon what ground did the general assembly proceed, if not upon that which I have stated? It cannot be supposed that they so totally mistook as to take that for law, in a point of this kind, which was not so received in general. They must have had some reason for thinking that the law was as they have plainly supposed it; and this reason could be no other than the then established usage and settled opinion in the province. That usage and that opinion could have had no other probable origin than the one before alluded to; and this origin was a legal one. It would have been a legal one even if the law of *England* had been changed without an act of parliament before the reign of *Charles* I. for I know of no authority courts of judicature have to alter the common law. I hold therefore that the law of *Maryland* is, that a husband cannot devise away his personal estate from his wife so as to debar her of her thirds. In a case circumstanced like the present there was no necessity for renunciation. No personal estate was bequeathed to Mrs. ———, and of course there was nothing to renounce. The acts of 1715 and 1729 relate to cases only where a considerable part of the personal estate is given to the wife. There was a plain reason for demanding a renunciation there, which has no existence here. The object of the law was to preclude the wife from taking both *under the will* and *under the rule* before mentioned; and clearly that object does not embrace an instance where nothing is given or can be taken under the will, but solely under the general rule. I have thus far considered this case upon the footing of what I allege to have been the law of this country before the act of 1715; but even under that act alone, and the practice since, I should be inclined to hold the same opinion. I do not think, indeed, that the act of 1715 reaches in the letter of its provisions the present case; but as it sanctions the wife's right in one instance, in opposition to the husband's

bequests to other people, and as the same reason applies to the case in question, I should suppose it would be going too far at this time of day, by a strict and rigid construction, to shake the liberal interpretation that is supposed to have been given to it by general consent and uninterrupted usage. In one point of view this act of assembly (even admitting that it introduced the law into *Maryland*, which I deny) will come strongly to this case. The wife's right to her third, in opposition to her husband's testament, was the common law of *England;* and if altered without authority by the judges before colonization and not introduced into *Maryland* before the act of 1715, that act may be considered as declaratory of the common law, and thus as justifying or rather requiring its revival. The common law had never been altered by those who were empowered to alter it, and a discontinuance of the use but for a short time had not abolished it. This act admits its force and brings it forward into practice as a rule of property; that rule has ever since been held as law, and it cannot now be shaken; it stands on the firm foundation of the ancient common law not repealed or abrogated; it is *acknowledged*, if not reenacted, by two acts of our general assembly; it is strengthened by the uniform opinion and usage of the country; and if it is not now the law of this state, it will be difficult to show that we have any law at all.

(Signed) WM. PINKNEY.

TREASON.

Observations on the law of treason in the United States, as applicable to the case of colonel Aaron Burr.

Written before the trial at *Richmond*.

THE primary question in this case is, what is meant by the terms *levying war*, as used in the constitution? do they mean preparing a force for war, or actually making war?

The supreme court, or rather the chief justice, in the case of *Bollman* & *Swartwout*, seems to have proceeded on the idea, that these words mean merely "the preparation of a force for the purpose of making war."

The distinction arises between the *preparation* of a force and the *use* of the force when prepared.

No case has arisen in this country, before that of *Bollman* & *Swartwout*, in which the attention of the court could have been called to this distinction. In the cases of the *northern* and *western* insurgents in *Pennsylvania*, the force was actually used as well as prepared. The question in those cases was, whether the use of force, in military array, for the purpose of opposing, not the general power of the government, but the execution of a particular law, would amount to "levying war."

It is a rule of constant recurrence and of the utmost importance too, in the application and construction of legal decisions, that general expressions employed by the court are to be taken with particular reference to the particular facts and questions then under consideration. The reasons of this rule are sufficiently obvious to all who have accustomed themselves to consider the operations of the human mind and the imperfections of language.

If, therefore, the court, in declaring their opinions in the cases of the western and northern insurgents in *Pennsylvania*, have used any general expressions which appear to give countenance to the doctrine, that merely "preparing a force for

war" amounts of itself to "levying war" within the meaning of the constitution, such general expressions must be construed with reference to the facts and questions in those cases, and cannot, therefore, be considered as authorities in favour of such a doctrine.

This great question therefore, which lies at the foundation of our whole law of treason, and the decision of which, in the manner which is now contended for, would give an entirely new complexion and character to that law, has never been considered, much less decided, before the case of *Bollman* and *Swartwout*.

In that case it was not raised nor discussed at the bar, nor ever incidentally adverted to. It was indeed contended that no force had been prepared, that no military assemblage had ever existed, in fact; which renders it wholly unnecessary to consider whether the mere preparation of the force, without using it for any hostile purpose, would constitute treason. Accordingly that question was not raised, nor in any manner considered. The argument went entirely and solely to show that no force had been prepared; in which case it was perfectly clear that no treason could have been committed.

From this course of the argument the supreme court seems to have considered it as admitted, or to be taken for granted, that the mere assemblage of the men, the mere preparation of the force, without the actual use of it for any hostile purpose amounted to treason. This doctrine was accordingly taken for granted, whether the evidence before them furnished probable cause for believing that a force had been assembled with an intent to make an attack on the *United States* or any part of their territory. Finding no such probable cause in the evidence they dismissed the prisoners.

Certainly it cannot be pretended that an opinion so given deserves the weight of an authority; as the point was not raised nor considered at the bar the court had no assistance in forming this most important and interesting opinion. Its attention was not particularly called to the point. No authorities were cited, nor do any appear to have been considered; and the

decision, therefore, is destitute of all those ingredients, which could give it weight and authority. This opinion, moreover, was perfectly unnecessary in the case; as the court was of opinion that in point of fact there was no probable cause to believe that an actual assemblage for hostile purposes had taken place, it became wholly unnecessary to decide what would have been in point of law the effect of such an assemblage if it had existed. Where, indeed, a point which afterwards appears to be unnecessary to the decision of the case has nevertheless been properly raised in it and has been argued and considered, the courts if clear in opinion on that point will decide; and their decision will have the weight of an authority. With instances of this the law books abound. But surely this degree of respect cannot be claimed for a decision which the case did not require, which involves principles of the greatest difficulty, novelty and importance, and was aided by no argument from the bar nor any particular consideration on the bench. Such a decision certainly cannot be viewed in any other light than that of a mere *obiter dictum* of the single judge who gave the opinion. Certainly it cannot be considered as settling the law of treason, more especially as, if it be so settled, that law assumes a new and frightful aspect, unknown to our forefathers and terrible to us and our posterity.

That this opinion was not maturely considered nor distinctly understood at the bench of the supreme court, that the distinction between the mere *preparation* and the *use* of the force never occurred to the learned and excellent judge who delivered the decision of that court in the case of *Bollman* and *Swartwout*, appears clearly from the very vague and inaccurate manner in which that part of the decision is expressed. This vagueness and inaccuracy, in a judge who is so remarkable for the logical precision of his ideas, can be accounted for only by the fact, that the distinction between the *preparation* and *use* of the force was not presented to the view of the court, and was of no importance in the case. If no force was actually assembled, no treason could be committed. This was clear and admitted. The case was rested at the bar on the mat-

ters of fact, that no force had been assembled. The court was of that opinion and decided the case on that ground. What the legal effect of the mere assemblage of the force might have been, what difference there is in law between the assemblage and the use of the force were points wholly immaterial and not raised nor mentioned in the argument. The court, therefore, was not called upon to consider these points; and in deciding the case, it used vague language, which proves that it confounded the preparation of the force with the use of it when prepared.

This is manifest from several circumstances.

First, This opinion cites and relies upon that which was given by judge *Chase* in the case of *John Fries*. Now the opinion of judge *Chase* expressly declares and in the part cited, that the force must not only be *collected* but *used* also, in order to constitute the crime of treason. The words of the judge are "some actual force or violence must be used, in pursuance of such design to levy war." That is, there must not only be an assemblage of men with intent to levy war, but they must do some hostile act; they must commit some violence.

If any doubt could remain from this part of judge *Chase's* opinion, that he considered the *use* of the force necessary as well as its *preparation*, that doubt would be removed by a subsequent part of his opinion, where he says to the jury, "It must be proved to your satisfaction that the prisoner at the bar (*Fries*) incited, encouraged, promoted or assisted the insurrection or rising of the people at *Bethlehem:* the terror that they carried with them, with intent &c. and that *some force was used* by *some* of the people assembled at *Bethlehem*."

Here it is expressly declared that the assemblage, the intent, the march to *Bethlehem* were not enough without *some force:* that is, some act of violence being used in pursuance of the hostile intent.

Judge *Chase* was on the bench when the opinion in the case of *Bollman* and *Swartwout* was delivered. Can it be conceived, that, in assenting to that opinion, he intended to assent to a proposition so contrary to the doctrine laid down by him-

self with great deliberation in the case of *Fries?* Can it be conceived that if he had understood the opinion to be thus contradictory he would not have objected to it; and that such an objection would not have produced an explanation among the members of the court, a discussion of this point and a difference in their opinions as delivered.

Is it not much easier to conceive that the chief justice in writing the opinion had confounded the assemblage of the force with the actual use of it by the perpetration of some act of violence; and that when the opinion was read to the other judges for their approbation, this mistake, relating to a point which had not been discussed nor even mentioned, had escaped their notice?

It is highly probable that an argument equally forcible might be drawn from the opinion of judge *Iredell* in the case of *Fries*, which is also cited by the supreme court in the case of *Bollman* and *Swartwout*, but as the book is not in my possession I cannot speak with certainty.

The opinions of judge *Patterson*, in the cases of *Vigol* and *Mitchell*, 2 *Dall.* 346. 348. &c. is also cited by the supreme court; and they furnish strong additional reason for believing that the court confounded the assemblage of the force with its actual employment. In those cases, acts of actual violence and hostility after the assemblage of the force were laid in the indictment and proved. Although the language of judge *Patterson* is not so clear as that of judge *Chase*, yet taken, as it must be, with reference to the subject matter, it shows sufficiently that the actual employment of the force in some act of violence or hostility, was necessary to constitute treason. Had he considered the mere assemblage and intent as sufficient, a great part of his reasoning was wholly superfluous; and he was very remarkable for avoiding superfluous reasoning and even superfluous expressions. He takes pains to prove that *Mitchell*, after attending the assemblage at *Couch's* fort, was sufficiently proved by two witnesses to have been present at *Neville's* house, where the act of violence was committed. The assemblage at *Couch's*

fort was an assemblage in arms for the express purpose of marching to attack *Neville's* house, as the commencement of a plan for suppressing the excise: a plan clearly treasonable. Had the assemblage and the intent been sufficient in the opinion of this great judge, *Mitchell's* treason was complete before he left *Couch's* fort, and whether he was at *Neville's* house was wholly immaterial.

The case in *Foster* 213. on which some observations will hereafter be made, is indeed cited by judge *Patterson* to show, that even the march from *Couch's* fort towards *Neville's* might be considered as an actual employment of the force; but even on this he does not rely. And certainly there is some colour for saying that an actual march of an armed body of men, after their having assembled, and for the avowed purpose of a hostile attack is an open act of war, in other words, an employment, as well as a preparation of force. It is certainly a very different thing from a mere assemblage. Yet judge *Patterson* does not rely upon it, does not even intimate an opinion that it was sufficient to constitute treason, but goes on to connect the attack on *Neville's* house, which was the *use* of the force, with the assemblage at *Couch's* fort, which was the *preparation:* a connexion which was clearly unnecessary if the assemblage and hostile attack had alone been sufficient.

Such being the obvious meaning of judge *Patterson* in his opinions on these cases of *Vigol* and *Mitchell*, the supreme court, in citing and relying upon these opinions, certainly furnish very strong ground for supposing that they did not mean to contradict nor overrule them, in a point so momentous; and that through want of attention to the distinction between the preparation and the employment of the force, a distinction not important in that case and not brought into their view, they confounded together two things perfectly distinct in their nature; and through mistake and inaccuracy of language, declared one to be sufficient to constitute an offence which clearly consists in the union of both.

The language employed by the supreme court in citing these opinions of *Chase*, *Iredell* and *Patterson* very strongly

corroborates this idea. "Their opinions, however," says the supreme court, "contemplate the actual employment of force."

These opinions are cited to prove that the doctrine then laid down by the supreme court was supported by former decisions. "In conformity with the principle now laid down have been the decisions heretofore made by the judges of the *United States*." These decisions declared, one of them expressly and the others by irresistible implication, that not only an assemblage of force, but its actual employment in some act of violence pursuant to the hostile design, is essential to the constituting of treason. Can it then be intended to cite these decisions as authorities to prove that the mere assemblage and hostile intent, without any act of violence, is sufficient to constitute treason? Is it not much easier to suppose that they fell into an inaccuracy of language, as to a point to which their attention had not been directed, which they had not been called upon to decide, and which was of no importance in the case then under consideration? And is not this rendered certain, by their saying that the opinions which they cite contemplate an *actual employment of force?*

What is the actual employment of force? Is it nothing more than merely collecting the force? Surely this question is sufficiently answered by a reference to the common signification of the words.

From this view of the subject, I conclude that the opinion of the supreme court on this point cannot be considered as an authoritative decision to the extent of its literal meaning. Should the circuit court think itself so far bound by this opinion, as to be unable to make a contrary decision, still it ought at least to adjourn the case, should circumstances render it necessary, until the supreme court can have an opportunity of reviewing that opinion, of hearing an argument upon the point and of settling the law after mature consideration.

Laying this decision therefore out of the case for the present, let us next inquire whether the doctrine that treason may be committed by a mere assemblage of men, with a hostile in-

tent without any act of force or violence pursuant to that intent, can be supported, either on principle or by authority.

And here I maintain that to levy war means, in common acceptation, not to prepare for war, but "to make war."

This appears clearly from the use of the word, in application to other objects. To levy an army means to raise an army. To levy a tax means to raise or make collection of a tax. To levy a contribution means to make or collect a contribution, (vide *Johnson's Dict.* and the authorities cited.)

In all these cases the word "levy" is synonymous with "make" or "raise," and implies that the act is finished, the operation completed. So the word "levy" when applied to war means to "raise" war. *Johnson*, ib. In all these cases "raise" is synonymous with "make." To levy or raise an army is to form or make an army. To levy or raise war is to make war. Otherwise the word would have two distinct senses as applied to these two cases, and "to levy an army" would be the same thing as "to levy war."

For if levying war be merely preparing for war, it follows that the levying of an army, which certainly is such a preparation, must be a levying of war. But this is contrary to the common use of language and the common sense of mankind. No prince is said to levy war, merely because he raises or levies armies. Even to raise or levy armies for the avowed purpose of attacking another state is not considered as levying war against that state. It is merely a preparation for war, which authorizes the state that is threatened to demand explanation, to prepare in its turn, and even to take strong measures of prevention. But still the two states are not considered as having levied war against each other, until some act of hostility has been committed: until the armies thus raised have been actually employed in some hostile purpose. Marching towards the territories of the other state for the purpose of attack might perhaps be considered as such an employment. Such a march is not merely preparation for war, but its actual commencement.

Is is equally clear that in legal acceptation also, levying war means *making* and not merely *preparing* war.

If preparing for war be levying war, how are we to ascertain the precise degree or mode of preparation? One degree or mode of preparation is equally preparation with any other degree or mode. Consequently any preparation to any extent, however small, would be treason.

But it is perfectly clear from all the authorities, and is expressly admitted by the supreme court in the case of *Bollman* and *Swartwout*, that neither a conspiracy to levy war, nor even the actual inlistment of men for the purpose, is treason. A conspiracy however to levy war is clearly a preparation for war. So is the inlistment of men; which differs from the other in nothing, but in being a further step in the same course of preparation.

If then preparing for war, by uniting persons in a conspiracy to make it, and even by inlisting men for the purpose of actually commencing, be not treason, I ask what is a mere assemblage of the men thus inlisted, but a further step in a mere preparation, as inlistment is a further step, after conspiracy? How are we to distinguish when inlistment ends and assemblage begins? Suppose three or four of the men thus inlisted be collected to wait for further numbers or further orders? Will this be an assemblage? If so, where is the difference in common sense and practice, between such an assemblage and mere individual inlistment? If not, how and by what criterion are we to ascertain what number will constitute an "assemblage?" Is it not manifest that if this doctrine of assemblage be established, the law of treason will be left in the greatest uncertainty? Is it not infinitely more safe and more consonant with the principles of the constitution to adopt some certain criterion, by which the guilt of treason may in all cases be ascertained? What is that criterion? I answer, the actual employment of the force so assembled in some hostile purpose.

On general principles therefore, it is manifest, that levying war consists in making war, and not merely in preparing to make it: and that an assemblage of men, for a hostile purpose,

but without any act of violence or force done by them, in pursuance of that purpose, is not making war, but merely a preparation for it, and therefore does not constitute treason by levying war, under our constitution.

I shall next attempt to show that this doctrine, which is dictated by reason, common sense and legal principles, is supported by the whole current of authority.

And I lay it down in the first place, that no adjudged case can be produced, either in the *United States* or in *England*, where any assemblage of men, for a hostile purpose against the government, has been declared to be treason, unless some actual violence was committed by them, when assembled, in pursuance of such purpose.

There have been, indeed, both in *England* and *America*, some general expressions, loose *dicta*, which may be carried to that extent. But mere *dicta* in a point of this importance are certainly not to be allowed the weight of authority; and general expressions are always to be understood with reference to the subject matter, to the facts and points, as to which they were used.

But in every adjudged case, that I can find, where treason has been declared to have been committed, there was the perpetration of some act of actual violence and force, by the people assembled, tending to the accomplishment of their hostile purpose.

Thus in the case of *Vigol*, 2 *Dall.* 346. the party after they had assembled, marched to *Reigan's* house, and afterwards to the house of *Wells*, and at each place committed acts of violence and devastation, with intent to compel the resignation of *Wells*, who was an excise officer, so as to render null the act of congress.

And in the case of *Mitchell*, 2 *Dall.* 348. the party assembled at *Couch's* fort, with a hostile intent against the *United States*, and thence they marched to general *Neville's* house, which in pursuance of that intent they attacked and burnt.

In these cases judge *Patterson* laid particular stress upon these acts of violence, as essential to the existence of treason.

It is true that in *Mitchell's* case, he cites *Foster* 213. to show that the mere march of the people for executing the hostile purpose, after they had assembled, was considered as a sufficient carrying into effect the hostile intent, so as to constitute treason. But although such a march, under such circumstances, is certainly a step in the business much beyond a mere assemblage, and may perhaps be considered as the actual commencement of war, yet judge *Patterson* does not rely upon it, but goes on to show that the prisoner was sufficiently convicted by the evidence, with the acts of violence committed at general *Neville's* house.

It is also to be observed, and it is a circumstance which gives rise to many important reflections on the nature of decisions and reports, that this very learned and accurate judge is entirely in a mistake in his reference to *Foster;* in whose whole chapter on the subject of treason by levying war, no such thing can be found. *Foster* indeed says, p. 118. that inlisting and marching are sufficient overt acts without coming to a battle or action. But the authority which he cites does by no means bear him out in this position; as will hereafter be shown more particularly.

In the same case judge *Patterson* is represented as saying of the prisoner, that "his attendance, armed, at *Braddock's* field, would of itself amount to treason, if his design were treasonable." p. 356. But this is a mere dictum. The attendance at *Braddock's* field had been but very faintly urged as a distinct act of treason. The acts done at *Couch's* fort and at *Neville's* house were the grounds of accusation relied upon both by the prosecution and the court. The question whether a mere assemblage without actual violence committed would amount to treason, had not been discussed nor even mentioned. An opinion, thus faintly and loosely formed, thus cursorily expressed, surely cannot have the weight of an authority upon such a point.

It is, moreover, highly probable that some acts of force or actual violence were committed at *Braddock's* field, but not being able to find any particular account of that transaction, I

cannot speak with certainty. In the "*Incidents of the Western Insurrection*," by *Brackenridge*, and in *Findlay's* history of that insurrection, such information may be obtained.

It is also highly probable that the reporter has, in this instance, misunderstood the judge. In the same page he has attributed to the judge a citation of *Foster*, which is erroneous; and we know how full the law books are of such errors.

In *Foster* 218 it is laid down that "an assembly armed and arrayed in a warlike manner, for any treasonable purpose, is *bellum levatum* though not *bellum percussum*." And for this is cited *Vaughan's* case, *Salk.* 625. and 5 *State Trials*, where nothing of this kind appears. *Vaughan* was indicted for treason in adhering to the king's enemies; and it was charged and proved that he commanded a ship under a *French* commission, with which he cruised for the purpose of attacking *English* ships. This cruising, with such an intent, was held to be a sufficient act of *adherence*, without actually fighting any *English* ship. Surely of this there could be no doubt; but we may infer from the conduct of the prosecutor that he did not consider even this as levying war. For if he had, he would probably have indicted *Vaughan* under that branch of the statute likewise.

In the report of this case, in 5 *State Trials*, there is a great deal of desultory conversation stated, between the prisoner's counsel and the court, in which many vague *dicta* are put into the mouths of the judges. One of them is made to say, that "listing and marching are sufficient overt acts without coming to a battle or action." This *dictum* is also cited by *Foster*, 218. as part of the law.

But surely it is not by desultory conversations between the bench and bar, by these *dicta* on points not arising and not argued in the case, by vague, crude and unconsidered opinions, thrown out by single judges, that the law, on questions of importance, is settled. "Inlisting and marching," moreover, is very different from a mere assemblage.

It is also worthy of remark, that these *dicta* are cited by *Foster*, when he is treating of treason by adhering to enemies, and

were thrown out by a judge in a case of that kind. It is therefore to be understood merely as a declaration, that such inlisting and marching are sufficient overt acts, not of levying war, but of adherence to an enemy.

Now it is clear that many acts will constitute an adherence to a people enemy, in actual war, which would not in themselves amount to war. In the same manner as where war has actually been levied by traitors, many acts will involve the authors in the general guilt, which would not, of themselves, taken unconnectedly, amount to levying war.

But in *Burstead's* case, id. p. 211. the house of the archbishop was actually *attacked*. And in the cases of *Damaree* and *Purchase*, which he reports at length, *pages* 213, 14, 15. the party, after it assembled, actually marched against and *demolished* several meeting houses, and attacked, with arms, the guards who came to disperse them.

And it is remarkable that some of the judges doubted as to the treason of *Purchase*, though he actually assaulted with a drawn sword the commanding officer of the guards and incited the party to the attack, "because it did not appear on the evidence that he had any concern in the original rising, or was present at the pulling down of any of the houses, or any ways active in the outrages of that night."

In sir *John Oldcastle's* case, a large military force was collected and armed, and actually marched in military array to *St. Giles's* for the purpose of attacking the king. This actual march in hostile array, after the assemblage, is declared by lord *Hale*, 1 *P. C.* 140. to amount to levying war; and we may safely admit it, though he cites no authority. For surely to march in such a manner, and with such an intent, after the assemblage, is a very different thing from the mere assemblage itself. It may, perhaps, be considered as an employment of the force after it has been prepared, and does not therefore militate with the doctrine for which I contend. See also lord *George Gordon's* case, *Doug.* 591.

Without pursuing further this particular review of adjudged cases, I refer to all those cited by *Foster*, *Hale*, *Hawkins*,

Keeling and *Coke*, 3 *Inst.* 10, &c. They will all be found to support the statement which I have made, viz. that there was actual force *employed* as well as *prepared* in all the cases which have been adjudged high treason for levying war.

It is laid down in all the elementary books and compilations, and in 4th *Blackstone's Commentaries*, that "an *insurrection* or *rising* to effect a purpose of general or national concern is treason." But none of them say that such rising or insurrection, without the actual perpetration of some act of force or violence, will be treason. They are treating, not of the sort of acts which will constitute treason, but of the intention with which the acts must be done. As their attention is particularly turned to the intention and not to the acts, they speak of the acts in a general manner and describe them by the general terms of rising or insurrection. But what particular acts are necessary to constitute such a rising or insurrection, as, being made for a treasonable purpose, will constitute treason of levying war, it was not necessary for them to consider, and they therefore do not state. But it cannot be inferred from this general mode of speaking that a mere assemblage of men, without any act of violence or any employment of force, would constitute a *rising* or insurrection. Indeed these terms, according to their usual and legal import, seem to include the idea of actual violence or the employment of force.

This idea is greatly strengthened by the doctrine of some writers respecting riots. They declare that a rising or insurrection, for some purpose of a private and not a general nature, as to pull down some particular houses, or to remove some particular inconvenience, is a great riot and not treason. See *Hale*, *Hawkins*, *Coke*, *Foster*, *Kelynge* and *Blackstone* on treason. Hence it appears that no rising or insurrection when accompanied by a treasonable intent will be treason, except such a rising or insurrection as, being accompanied by an unlawful but not treasonable intent, would be a riot. But it is clear that no assemblage of men, without some act of unlawful violence or force will constitute, in law, a riot. See 4 *Bl. Com.* 146.

This conclusion is irresistible, as it seems to me, that when these writers speak of *risings* or *insurrections*, they mean assemblages of men accompanied by some acts of unlawful violence: and that no mere assemblage, without such act, can amount to treason, with whatever intention it may have been made.

But this doctrine does not depend on inferences, however strong, nor on general reasoning, however conclusive. It has been settled by an adjudged case of the highest authority and on the most solemn deliberation. I mean the case of *Green*, reported by *Kelynge* 72.

A great number of persons assembled in *Smithfield* and *Moorfields* under pretence of pulling down bawdy houses. They had a captain, who marched at their head, with a drawn sword. They also had colours. In this array they marched and attacked the houses, many of which they pulled down. The peace officer, coming to quell them, they attacked and wounded him, and took away his staff. *Green* was present and encouraged them by throwing up his hat, shouting, &c. All this matter was found by a special verdict on an indictment for treason by levying war. All the judges of *England*, except *Bridgman*, then keeper of the great seal, met to consult on this special verdict. They pronounced the other persons guilty, not without some difference of opinion. But as to *Green*, they were unanimously of opinion, that there was not enough found to warrant judgment against him; because the verdict, though it found that he was *present*, "did not find any particular act of *force* committed by him." This requires no comment. It is reported at large in 2 *State Trials*.

Two other decisions are cited by *Keeling*, p. 75. which are very strong to this purpose. In both these cases the actual employment of force, for the execution of the treasonable purpose, superadded to the assemblage and the intent is stated by the judges, as necessary to constitute treason by levying war.

And it also appears from 1 *Hale P. C.* 146. and from *Foster's* manner of citing that passage, p. 219. that the *actual use* of force was necessary to constitute treason by levying war. *Hale*,

as explained by *Foster*, declares that detaining a castle against the king, if actual force be used in order to keep possession, is treason by levying war. But that a bare detainer, as by shutting the gates against the king or his forces, without any other force from within will not amount to treason. If the case in *Kelynge*, which is a solemn decision upon the very point and is the only case where the point was raised or discussed, needed any confirmation, it would be found in this opinion of *Hale* and *Foster*.

Laying, therefore, the opinion of the supreme court out of the case, I hold it to be clear and settled law, that the actual employment of the force, after it has been assembled, in some unlawful act of violence conducive to the accomplishment of the hostile design, is necessary to constitute the crime of levying war.

The application of this doctrine to the case of colonel *Burr* must, I apprehend, be decisive: for, if I am rightly informed, it is not pretended that any act of force or violence, or any unlawful act of any kind, was done or attempted by the men who were assembled at *Blannerhassett's* island: or even that they marched or proceeded from that place with any hostile purpose. If so, the prosecution must fail, on that ground.

I hope that it will fail on previous grounds: that it will be satisfactorily proved that no hostile act was intended against the *United States*, or any part of their territories: that the military expedition was intended against *Spain:* and that it was essentially bottomed upon the existence of war between us and that power, which there was, at that time, every reason to expect, and which would have rendered these preparations not only innocent, but useful and meritorious. To these points I should think it right to direct the great force of the defence.

To the end that this fair and honourable defence might have its proper effect, I should think it the duty of his counsel carefully to avoid every topic of irritation, every harsh expression and every measure that might have the effect of exciting passion or of inlisting party spirit on the side of the prosecution. They should even avoid all attacks upon general *Wilkinson*, or any other witness for the *United States*. They should abstain,

as much as possible, from legal exceptions of all kinds, and especially from exceptions to testimony. Let them place the defence of their client upon the high ground of fair and honourable conduct, which has nothing to conceal and therefore courts a full explanation of all the facts. Content with justifying the accused, leave the public to appreciate the motives of the accusers. A person who is accused will generally have the public feeling on his side, if he do nothing to produce irritation and turn it against him. To have this feeling on his side is of unspeakable importance, in cases of obscure and complicated facts, which are to be decided upon contradictory testimony. It is such cases that afford the greatest scope for the passions to influence and mislead the judgment. That the discriminations of the judgment may be clear and accurate, the passions ought to be, to the utmost, allayed and kept down. From the character and political connexions of those who are to decide upon the facts in this case, the operations of their passions must be against the accused. His reliance is on the calm and dispassionate discriminations of their understanding. To excite passion therefore is to injure his cause in the most fatal manner.

REVIEW.

ARTICLE I.

TYNG'S REPORTS.

[Not having been able to obtain a copy of Mr. *Tyng's* Reports and being entirely without aid in our work, we have extracted this criticism from the "*Monthly Anthology* and *Boston Review;*" a very valuable journal which is supported by a combination of talents and learning, not very common in this country. It is not often that we see this work, but as far as we have an opportunity of forming an opinion, we think that it is entitled to the liberal support of the gentlemen and scholars of the country. Particular praise is due to the sedulous attention which is devoted to domestic literature; and in their criticism, the writers evince not less perspicacity to discern, than liberality to award, the proper share of merit to the various candidates for the honours of authorship.]

Reports of Cases argued and determined in the Supreme Judicial Court of the commonwealth of *Massachusetts*, during the year 1806. By *Dudley Atkins Tyng*, esq. counsellor at law. *Newburyport*, *E. M. Blunt. pp.* 268.

REPORTS of judicial decisions, when accurately made, are instructive to the general reader, and of the highest utility to the professional advocate. In all countries such decisions are examined with public interest, and in those, where courts promulgate the binding law of the land, unalterable except by the legislature, they have obtained peculiar reverence. In a free government, where the life, liberty and property of every person is subject to the control of the laws, and of the laws only, their security requires, that tribunals of justice should not only be enlightened and impartial, but should be so deemed in the public opinion. Nothing can be better calculated to enforce such a belief than a correct detail of their proceedings.

Within the last half century a variety of reports of decisions, in the superior courts of *Great Britain* have been published, which in authenticity and accuracy are undoubtedly far above those which preceded them. With the exception of a few, and among these should certainly be named the Commentaries of *Plowden* and the Reports of *Dyer*, *Coke*, and *Saunders*, the ancient reporters are generally obscure in their method, and frequently inaccurate in their statements and language. Loose notes from the paper books of eminent judges or hasty sketches from the briefs of eminent counsel have too often been crowded into the public view 'with all their imperfections on their head,' and added to the perplexities and the doubts of succeeding ages. We can hardly be deemed severe, if with Mr. justice *Buller*,* we include in this number the collections under the name of *Comberbach* and *Noy*.

It has therefore been with pride and pleasure, that in the volumes of *Burrow*, *Cowper*, *Douglas*, *Henry Blackstone*, and the *Term Reports*, we have seen the modern adjudged cases presented in a succinct and authentic form in nearly a continuous series. Of the various methods, adopted by them, each has its advantages and its defects; but we feel ourselves compelled to prefer that which unites brevity with precision and clearness. The multiplicity of modern law books makes it desirable to reach the point decided with as little unnecessary labour as possible.

The *United States* have, until within a few years, trusted to tradition the reasons of their judicial decisions. But with wealth and commerce, and with more enlarged views of jurisprudence it became obvious, that the exposition of our statutes and the validity of our customs should rest upon a more secure basis than the memory of man or the silent influence of unquestioned usage. Accordingly, reports have been published in many states; and of these among the best are those of *Dallas*, *Cranch*, *Caines*, and *Johnson*. On the merits of these we are not now called to decide; but the perusal of some of them in-

* In bishop of *London* v. *Fytche*, *Dom. Proc.* 1783.

duces us to suggest, that the insertion of the elaborate arguments of counsel at full length is neither useful nor necessary. An abstract of the principal points, and a summary view of the leading arguments, urged in their support, comport best with the design of publications of this nature. It adds no inconsiderable weight to this suggestion, that the price of lawbooks has already become a serious burthen to the profession.*

We have heretofore had occasion to notice a volume of reports of the supreme judicial court of this commonwealth; and we announce with pleasure the present, as a continuation under the patronage of the legislature. Mr. *Tyng*, who has succeeded Mr. *Williams* in the office of reporter, offers to the public, in this first part, the decisions of the year 1806; and has executed the task in a manner highly creditable to himself, and we believe, satisfactory to the profession. It was to be expected that the embarrassments of a first attempt under a system not perfectly organized for the purpose would occasion some errors, which a more distinct separation of law and fact would correct, and some decisions, which a more nice discrimination between *nisi prius* and *bank* duties would not indulge in regular reports. But in time the novelty of the undertaking would wear away; and familiarity would render a technical language and manner, of equal ease here as in the arguments and judgments of *Wesminster-hall.* We considered therefore the reports of Mr. *Williams* as entitled to a candid examination; and though not perfect in method, yet leading, and honourably leading the way to more exact and more erudite labours. The gradual improvements which we anticipated appear in the volume of his successor, whose modesty has asked indulgence for errors and defects, which, if they exist at all, are neither numerous nor material. In his preface he says; ‘ Errors and defects of another class will occur to the

* *Dallas* and *Cranch* are particularly faulty in this respect, though we feel no disposition to depreciate their general merit. *Johnson* is particularly valuable.

learned reader. To the candour of such the reporter believes, that besides the novelty of the employment to him, several other circumstances will suggest themselves as forming some excuse for such errors and defects.'

The method, which Mr. *Tyng* has adopted, meets our entire approbation. It states the reasoning of counsel concisely, yet clearly, and the opinions of the court fully, and, as far as our knowledge extends from our own notes, very accurately. The points of the cause, stripped of extraneous circumstances, are generally presented in a space which is unexceptionable. The style is simple, but appropriate; and the judicious arrangement of the scholar and the lawyer is every where visible.

The volume contains a considerable number of cases, some of local, and many of general interest. It is not our design to enter into a minute review of them, either as it respects their juridical soundness or their relative importance. It is not for us to question the judgments of the supreme tribunal of the commonwealth, delivered by judges of great personal and professional respectability. They have pronounced and declared the law of the land; and from their characters and stations we should not lightly doubt the authority of principles, which have been weighed with care and argued with solemnity. In the few remarks, which we may hazard in respect to any new cases, we beg to be understood, as less questioning the law, than suggesting difficulties of our own, which are perhaps unfounded.

The decision in the case of *Amory* v. *Gilman* (*page* 1.) by which the validity of a wager policy at common law is *here* shaken, if not denied, is consonant in our opinion with the dictates of sound morals and equity. It was a gratification to us to find the opinions of Mr. justice *Buller* and Mr. sergeant *Marshall* on this subject supported by all the weight of the bench. Should the validity of wagers generally ever come in question, we hope to hear pronounced in the words of an enlightened judge* in this cause, ' It would seem a disgraceful

* Mr. justice *Parker*, p. 6.

occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There would be but one step of degradation below this, which is, that the judges could be the stakeholders of the parties.'

UNIVERSITY OF MICHIGAN

In the *Commonwealth* v. *Andrews* (*page* 14,) the court decided, that where goods are stolen in another state, and received in this, as such, the party so receiving is liable to indictment at common law, as a receiver of stolen goods. The liberal spirit which dictated this decision upon principles tending to cement the polity of the union will meet, we trust, the attention of our sister states.

The case of *Brooks* v. *Dorr* and another (*page* 39) which decides, that a sailor is entitled to his wages, notwithstanding a capture, in consequence of which he is separated from the vessel, if the vessel afterwards proceed and earn freight, is argued by the judges at great length, and with great ability. It has shaken the case of the Friends, *Bell.* 4 *Rob. Adm. Rep.* 143. which had been previously questioned in *Beale* v. *Thompson* 3 *East, Rep.* 560. At the close of his opinion (page 50) an observation is dropped by the chief justice (*Dana*,) which we fear we do not understand. He says, 'It will be understood, that no decision is made by this judgment, of a case, in which it should appear, that seamen had been hired to supply the place of the plaintiff within the time, for which he demands wages. That is not the present question, and it will be time enough to decide it, when it is regularly before the court.' On recurrence to the state of facts it appears, that the captain actually hired other seamen to complete the voyage, and during the time for which the plaintiff claimed, and is allowed wages by the judgment in this case.

In the case of *Benson* v. *Swift* (page 50,) we observe the case of *Mitchell* v. *Neal, Cowp.* 828. cited by the counsel. That case was expressly overruled in *Burgess* v. *Freelove*,

2 *Bos.* & *Pul.* 425.; but by some may be thought *in some degree* restored by *English* v. *Purser*, 6 *East Rep.* 395.

In *May* v. *Calder* (page 55), it was decided, that the lease of an infant's land by his father, as natural guardian, is void. The expressions used by the court are very general; but we presume that they are to be referred to the facts of that particular case. In 1 *Wooddeson*, 459, 460. and authorities cited in note *(l.)* it is stated, that a guardian by nurture may at least make a lease at will. If it did not savour of too much nicety, we should in this case call the father guardian by *nurture*, rather than by *nature*, according to the distinction in *Hargrave's* note on *Co. Lit.* 88. *b.* note (13).

In *Richardson* and another in error v. *Noyes* and another (page 56.) will be found a very elaborate opinion of the court, delivered by Mr. justice *Sedgwick*, in which the doctrine of executory devises is discussed with great learning. At the close of it, we are furnished with a note of the argument of Mr. *Parsons*, of counsel for the defendants in error, which has been truly declared by the court to be very ingenious and very able.

In page 77. occurs a memorandum of the resignation of chief justice *Dana*, and we can truly say, in the words of the reporter, 'The remembrance of the impartiality, dignity and learning, exhibited by him, will be long cherished by those who have been concerned in the business of this court, while he held a seat on the bench.' The hon. *Theophilus Parsons* was appointed as his successor. May this gentleman, so long the distinguished ornament of the bar, for many years continue on the bench, et dulce decus et præsidium.

The case of *Perkins* v. *Burbank* (page 81.) on a question of special pleading, we admitted with some hesitation; and had prepared a note of some length on the subject. But knowing, as we do, the peculiar eminence in this branch of law of the chief justice, who delivered the opinion of the court, and considering him entitled to the eulogy of the late lord *Kenyon* on baron *Comyns*, 'that he was the ablest pleader of his day in all

Westminster-hall,' we have feared a fallacy in our view of the case, and have suppressed it.*

In *Pearsall* and others v. *Dwight* and others (page 84.) is a decision in conformity with the principles in *Nash* v. *Tupper*, 1 *New-York Term Rep.* 402. As it is of considerable importance, and strongly illustrates the doctrine of the operation of the *lex loci* on contracts, we shall quote in a subsequent page the opinion of the court, as delivered by the chief justice.

The case of *Wright* v. *Wright* (page 109.) adjudging that the mother of a bastard child has a right to the custody of it, in preference to the putative father, agrees with *Rex* v. *Soper*, 5 *T. Rep.* 278. and *Rex* v. *Mosely*, 5 *East Rep.* 224. note (*a*).

In *Nelson* v. *Andrews* (p. 164.) it is settled, that arbitrators have a right to award concerning the costs of a suit referred to them. And with this agrees the *English* doctrine in *Sheppard* v. *Brand*, *B. R. H.* 53. *Chandler* v. *Fuller*, *Willes* 62. *Barnes* 56, 58. *Roe* v. *Doe*, 2 *T. Rep.* 644.

In *Merry* in *Rev.* v. *Prince* (page 177.) the question was agitated, whether the statute of 19 *Geo. II. ch.* 37. respecting reassurances, extended to this country; and after an able argument the court were of opinion, that it did not.

In *Sparhawk* v. *Bartlett* (page 188.) it is decided, that in this commonwealth an action lies against the sheriff for taking insufficient bail. In *England* the law is admitted to be otherwise; but the reasons, upon which a different adjudication is made here, are most satisfactorily and learnedly expounded in

* Lest however our doubt should appear wholly idle we would refer to *Webber* v. *Twill*, 2 *Saund.* 227. *Humphreys* v. *Churchman*, *B. R. H.* 289. (this is usually cited, cases in *K. B.* 7 to 10 *Geo. II. temp. Hardwicke*,) *Freeman* v. *Hurst*, 1 *T. Rep.* 40. 1 *Tidd's Pr.* 3d *edit.* 637. note (*i*); *Lawes on Plead. app.* 238 and note (2); and the note of serg. *Williams* in *Manchester* v. *Vale*, 1 *Saund.* 28. note 2; as showing that a replication may, without being double, contain separate answers to different parts of an entire plea, provided the whole form but one complete answer to the plea, and one entire support of the declaration; and that where the plea is entire, and the replication does not contain an answer to the plea, as it respects some counts in the declaration, such replication is bad.

the opinions delivered by Mr. justice *Sewall* and Mr. justice *Sedgwick*.

An interesting discussion occurs in the case of *Killam* v. *Ward* and others in *Rev.* page 236. and in *Gardner* v. *The same*, cited in page 244. of the same case in a note, respecting the question of the alienage of persons, who went away from this country during the revolution, and adhered to *Great Britain*. The cases are argued at large, and commented on with great diligence and ingenuity by the court. A variety of important principles seem to be put at rest by these decisions, which we recommend to the examination of the bar.

We have thus noticed in a cursory manner a few of the more striking causes reported in the volume. On the whole, upon a careful review we must express our satisfaction with the manner in which the work is executed. We confidently believe, that it will reflect honour on the bar and the bench. Time may lead to some improvements in the method of an undertaking, the difficulties of which can be realized only by experience. But time will not rob the reporter of the reputation of diligence and fidelity, nor the court of the praise of ingenuity and erudition.*

As a specimen of the work we shall select one or two of the short cases, which, we regret, are all our limits will admit.

* We are led to observe, that intelligent and fair minds usually think alike on all important occasions, where they deliberately exercise their judgment, and are free from prejudice, from the circumstance, that throughout this volume we do not find one instance, in which the court are divided in opinion. It may therefore be considered as a work containing cases *settled* as well as *adjudged*. We observe likewise, that where one judge pronounces the opinion of the court, it usually combines learned research with a dignified style and manner. Instances of this are frequent in the work, and do not require a particular enumeration. A judge, feeling that he is expressing the opinion of his brethren, and that his own character as a lawyer and as a scholar is in question, will naturally on such an occasion exert all the energies of his mind. From the present arrangement of the judicial department, under the auspices of the government of the commonwealth, we indulge the hope, that the juridical character of *Massachusetts* is about to exhibit a '*novus ordo seclorum*."

We shall then take our farewel with the recommendation of *Horace* to the professional student.

Si quid novisti rectius istis,
Candidus imperti; non, his utere mecum.

'*Thomas Pearsall et al.* v. *Josiah Dwight et al.*

'Assumpsit on a promissory note. As the pleadings in this case are fully stated in the opinion of the court as delivered by the chief justice, for the sake of brevity they are here omitted. The question on the pleadings was, whether to an action in this commonwealth on a promissory note made in *New-York* and payable there, the plaintiffs being inhabitants of that state, and the defendants inhabitants of this commonwealth, a plea of the statue of limitations of the state of *New-York* was a good bar."

'The opinion of the court was afterwards delivered by

Parsons, C. J. From the record in this cause the declaration appears to be on a negotiable cash note, payable by the defendants to the plaintiffs, or their order, on demand. To this declaration there is a plea in bar, alleging that the plaintiffs long before, at the time, and ever since the note was executed, were inhabitants of the state of *New-York;* that the note was there made; that before it was made, and six years before this action was commenced, there was a statute of that state still in force, which, among other things, limited the time of suing an action of this description to six years next after the cause of action accrued, which part of the statute is particularly pleaded with a *profert* of the exemplification of the whole statute, and there is the averment necessary to bring this action within that statute.

The plaintiffs in the replication neither pray oyer of the exemplification of that statute, nor particularly plead any exceptions made in it, but confess and would avoid the bar, by alleging that the defendants were, during all the time, inhabitants of this state.

The defendants, in their rejoinder, confess and would avoid the replication, by averring that, since the making of the note, and more than six years before this action was commenced, the defendants went and returned to the state of *New-York*, and were there ten days, with the knowledge of the plaintiffs.

To this rejoinder the plaintiffs demur generally, and the defendants join in demurrer. Whether this rejoinder be good, is the issue in law immediately before the court.

If the matters alleged in the replication are sufficient to avoid the bar, the rejoinder must be bad, because it neither traverses those matters, nor shows any provision of the statute of *New-York*, by which the effect of the replication is avoided by the collateral facts pleaded in the rejoinder.

For the same reason, if the matters alleged in the bar are sufficient in law, the replication must be bad, for the plaintiffs do not plead any excep-

tion in that statute, by which the bar, when confessed, may be avoided. Notwithstanding the *profert* of the exemplification of that statute, yet if it contained any exception, on which the plaintiffs intended to rely, they ought either to have prayed oyer and spread the whole statute upon the record, or to have particularly pleaded such exception in their replication, and then to have made the allegation necessary to bring their case within it. This reasoning is grounded on the opinion that, if that statute can avail in this court, when pleading in bar, the bar cannot be avoided, but by virtue of some provision of the same statute. As the pleadings now are, the court cannot take notice of any parts of that statute, but of those which are particularly shown in the bar.

Although the rejoinder be bad, yet if the replication is also bad, the defendants must have judgment, if the bar be good.

Thence the great question in the cause is, whether to an action commenced in a court in this state, by the plaintiffs, inhabitants of *New-York*, on this note there executed, by the defendants, inhabitants of this state, the statute of limitations of the state of *New-York* can be pleaded in bar.

That the statute of another state cannot *proprio vigore* have the force of law in this state is very clear, and its effect in this court must depend on the laws of the commonwealth.

It is a general rule, that personal contracts entered into, and to be performed in any one state, and which are there valid, are to be considered as valid in every other state.

This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law.

To give effect to contracts of this description is an act of comity due from the courts of the state in which such contracts may be sued to the state in which they may be made.

This rule is subject to two important exceptions. First, that neither the state in whose court the contract is put in suit, nor its citizens may suffer any inconvenience by giving the contract effect. And secondly, that the consideration of the contract be not immoral, and the giving it effect will not have a bad tendency. Under these exceptions, the cases, which do not come within the rule, may be classed.

The contract on which this action is founded is clearly within the rule. It was made in *New-York*, and might there be performed: The plaintiffs, when it was made, were inhabitants of that state, and so are the defendants to be considered in this cause by going and making the contract there: The contract, when made, was valid by the laws of *New-York:* The giving it effect here cannot be injurious to the commonwealth, or its citizens, nor have an evil tendency: And the consideration is not immoral: The court are therefore obliged, by the laws of the commonwealth, to consider it as a valid contract, according to the true construction of the rule.

The party claiming the benefit of the note in this case has sued it originally in a court in this state; the law of the state of *New-York* will therefore be adopted by the court, in deciding on the nature, validity, and construction of this contract. This we are obliged to do by our own laws. So far the obligation of comity extends, but it extends no farther. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed, exclusively, by the laws of this commonwealth.

These are matters not relating to the validity of the contract; and to permit the laws of another state to control the court in its proceedings concerning them, would intrench upon the authority of our own laws unnecessarily and for no principle of *common utility*. Cases may also be supposed, in which this permission might be injurious to our citizens. If the state, in which the contract was made, had no statute of limitations, then by the *lex loci* the action might there be commenced at any time, and if the plaintiff should afterwards remove to this state and commence his action in our court, the defendant would be deprived of the benefit of the limitations here in force. That the form of the action must be comformable to our laws, the case of *Folliot* v. *Ogden* (7) is an authority. In giving the opinion of the court, lord *Loughborough* considers it as law, that when a bond made in a foreign state, by whose laws it is assignable, is sued at law in *England*, the suit must be according to the laws of *England*, in the name of the obligee, and not of the assignee, although it be for his use, because, there, bonds are not assignable *at law*. As to the time when the suit may be commenced, no authorities in point have been cited from our books, nor do I recollect any: (8) but the subject has been considered by foreign jurists of great merit.

In the prelections of *Huber*, under the title *De Conflictu Legum*, (9) he states a case, in which an action was commenced in a court of *Friesland*, by a *Hollander* against a *Frieslander*, on a contract made in *Holland*, and the limitation, in force in *Freisland*, was pleaded against the action. The *Hollander* contended that it could not be pleaded against him, to that contract, which was to be decided by the *lex loci*, or the laws of *Holland*. But the judgment was against the *Hollander*. After mentioning another case upon execution, in which the *lex loci* was not allowed to govern, the author adds: " *Hæc est ratio, quod prescriptio et executio non pertinent ad valorem contractûs, sed* ad tempus *et modum actionis instituendæ, quæ per se, quasi contractum separatumque negotium constitit; adeoque receptum est optima ratione, ut in or-*

(7) 1 *H. Blacks.* 135.

(8) But see the case of *Duplein* v. *De Rouen*, *in* 2 *Vern.* 540, in which the statute of limitations of *England* was allowed to be pleaded, where the contract was made abroad between two foreigners. C. J.

(9) *Vol.* 2. *Lib.* 1.

dinandis judiciis, loci consuetudo ubi agetur, etsi de negotio alibi celebrato, spectetur."

It is therefore the opinion of the court that the plea in bar is not good.

Consequently the judgment on the demurrer must be, that it appears to the court that the rejoinder is bad and insufficient in law, &c.

'*Simeon Nelson, plaintiff in error*, v. *William Andrews.*'

This was a writ of error brought to reverse a judgment of the court of common pleas for this county rendered in *May*, 1800. The original action, with all demands between the parties, was referred in the court below and the report of the referees was that *Andrews*, who was original plaintiff, should recover six dollars and sixty-nine cents damage and costs of reference, with one quarter part of the costs of court. The court, notwithstanding this report, gave judgment for full costs of court, and for this error the present process was instituted.

Bigelow, for the plaintiff in error, read the 3d section of "an act for the limitation of personal actions and for avoiding suits at law," and the proviso annexed to that section, which last is in these words, "provided always, that where judgment shall be rendered upon the report of referees, full cost shall be taxed for the party recovering, notwithstanding the judgment be under *four pounds*, unless a different adjudication respecting the costs shall be made from the report itself." And he observed that in this case, the referees having made a different adjudication, the judgment of the court below ought to have been conformed to the report. And he further insisted,

1st. That for this error the judgment must be reversed *in toto*, and for this he cited *Lampen* v. *Hatch* (1) and *Cunningham's Law Dict. Title Error* —and

2d. That the plaintiff in error was entitled to costs upon the writ of error. (2)

Ward, on the other side contended,

1st. That the judgment in question was not erroneous. The statute gives full costs to all parties recovering damages by the report of referees, and referees exceeded their commission when they made their award respecting the costs. As they had no authority on the subject, the court were right in giving full costs. But

2dly. If the judgment is erroneous in this respect, this court is competent to set it right by reversing so much of it as is erroneous, viz. three fourths of the full costs: which last being 30 dollars 25 cents, the most that

(1) 2 *Str.* 934.

(2) *Ferguson* v. *Rawlinson*, 2 *Str.* 1084. *Cro. Car.* 175, 145. *Penruddock* v. *Clerk*, *Cro. Eliz.* 659. 5 *Rep.* 101. *S. C.*

the plaintiff in error is entitled to recover, is 22 dollars 76 cents, 1 *Str.* 188. and

3dly. That this being an error in matter of law only, the plaintiff in error was not entitled to costs upon the writ of error.

Bigelow, in reply, cited from "an act prescribing the forms of writs," &c. passed *Oct.* 30, 1784, *sect.* 9.—"in all actions as well those of *qui tam* as others, the party prevailing shall be entitled to his legal costs against the other." And he contended that writs of error were within this provision.

Parker, J. I am very clear that this judgment is erroneous. A submission of all demands between the parties was a submission of the question of the costs of the suit. If it were not so, the practice has uniformly prevailed, and been acquiesced in. In some cases referees award a large sum in damages, and yet determine that the party, in whose favour they make their award, shall recover no costs. The practice having thus obtained, I think that the referees did not exceed their authority, and that the court below, having accepted the report, ought to have conformed their judgment to it. I am therefore of opinion that the judgment of the common pleas should be reversed in part, viz. for the amount of three fourths of the costs allowed: and that the plaintiff in error is not entitled to his costs in this process, the error being entirely in matter of law.

Sewall, J. The correctness of the judgment brought into question by this writ of error depends on the authority of the referees to make their award respecting the costs. Without looking into *English* authorities, it is sufficient that the practice here has been constant and uniform, and has been recognized by the legislature. The court of common pleas ought then to have made their judgment conformable to the report in this case. Not having done so, the judgment is erroneous. It can however be set right, without a reversal *in toto*, and the error being in matter of law only, this must be done without costs.

Sedgwick, J. The report in this case expressly limited the costs to be recovered by the plaintiff to one fourth part of the *legal* costs of the suit. That report was accepted by the court, and yet judgment was rendered for the whole of the legal costs. Is this error? I am most clearly satisfied that it is. On a general submission of all demands, as was the case here, nothing relative to costs is specifically submitted; but in practice referees have uniformly awarded respecting them, sometimes for the whole, sometimes for part, and sometimes for none; and this practice has been sanctioned by the court. The statute gives no express authority to the referees for this purpose, but it clearly supposes such authority to exist. The referees, then, having had authority to make this part of their report, the party ought to have taken his judgment, accordingly, for the one fourth part of the costs, and not having done so, but the judgment having been rendered for the whole legal costs, is for that reason erroneous.

Where part of a judgment can be reversed, and the rest remain, it is competent for this court to set it right. The error here being in matter of law, there can be no costs on the writ of error.

Parsons, C. J. The report having been accepted by the court below, they ought to have pursued it in rendering their judgment, unless this part of the report can be rejected as surplusage. But if, by the terms of the submission, the referees had jurisdiction of the question of costs, their award concerning them is not to be rejected. This practice is of so long standing that it cannot now be shaken, if we were so disposed. But the practice may be considered as beneficial. There may be reasons, respecting the allowance of costs, which in the minds of referees would very properly have weight, although they could not be admitted in a court of law. It may appear to them, that a creditor has unduly harassed his debtor for a trifling demand or has brought his action before the cause of action had accrued. Many other reasons may be conceived. It was therefore both legal and expedient that these referees should take the subject of costs into their consideration, and make their award concerning them. The court having accepted the report were bound by it, and ought to have followed it in rendering their judgment. There is no doubt then that their judgment is erroneous. As the error extends to part of the judgment only, it must be reversed for that part, and will remain good for the rest.

Let the judgment be reversed for three quarters of the costs: and as the error was of law, and not of fact, the plaintiff in error is not entitled to costs.

ARTICLE II.

THE HONEST POLITICIAN,

PART I.

Containing the first eight numbers; together with a publication under the signature of *Vindex*, relative to the same subject. Addressed to the president, and published in the *district* of *Columbia* about the middle of *February* last. *Baltimore*, 1808, pp. 65. twenty-five cents.

AS this pamphlet contains a discussion of some points in the law of nations, as involved in the capture of the Chesapeake, which are particularly interesting to the *United States* at this juncture of our affairs, it is fairly included within the objects of the *Law Journal*. With what are called the politics of the day, that is to say as the word is vulgarly understood, whe-

ther general *Washington* was a peculator and Mr. *Adams* acted under the influence of *British* gold, as is asserted by one party, or whether their successor, Mr. *Jefferson*, be the tool of *Bonaparte*, and would be willing to add this country to the ample chart of his possessions, are questions which cannot be discussed in these pages. But whether the ships of war of one country are justifiable in searching those of another, what are the duties which good faith requires from a neutral nation towards a belligerent, and how far it is consistent with the obligations of national honour and individual honesty to afford protection to the seamen of our neighbours, may surely be investigated without affecting the sensibility of those who fear that this is to be a party work. The pamphlet under consideration is ascribed to the pen of a gentleman, who has long occupied a conspicuous place in the front rank of the legal characters of this country. This is the place of his birth, and he is united to it by the most intimate ties of interest and affection. He therefore can have no other object in this discussion than to obtain a fair decision. He informs us that he is a native *American* and that his intention in writing was to prove " that the affair between the *Leopard* and *Chesapeake*, which has been seized upon with avidity by our administration to widen the differences between us and *Great Britain*, and which he sacredly believes was planned for that purpose, originated in the misconduct of our government, and that in truth our government was the aggressor."

Our naturalization laws seem to regard man as in a state of nature, with a perfect right to violate the contract of obedience which he has entered into with his government in consideration of protection being afforded to him in his life, liberty and property. Hence the outcasts of other countries, the very sweepings of their jails are welcomed to this asylum of oppressed humanity. They are immediately enfranchised with the rights of citizenship, and they quickly convince us of the value of the acquisition, which we have made, by opposition to our government and hatred to that which they have deserted.

On the affair of the *Chesapeake* it has been contended that

no government is bound to deliver to another those fugitives from justice which have taken refuge within its jurisdiction. If this doctrine should be carried into execution crimes may be committed with impunity and laws may be enacted in vain. But it is a doctrine so pregnant with pernicious consequences, so radically vicious, that the good sense of the individual and the policy of the nation alike revolt against its dangerous influence. In the constitution of our government we have recognized the necessity of delivering up fugitives from justice;* and if the doctrine be correctly applicable to states why should it not be extended to nations, according to the civil law *sub mutuæ vicissitudinis obtentu et in juris subsidium?* The *Honest Politician* says that he who harbours a robber participates in his guilt, and, by a parity of reasoning, he contends that a nation which protects a criminal, makes the crime its own. In answer to the 27th article of the convention between this country and *Great Britain*, commonly called *Jay's* treaty, he says, that articles in treaties are frequently inserted in cases which had been amply provided for by the law of nations; and that, therefore, although that article, by which the nations were bound to deliver up fugitives to each other, has expired, still the general law is in force. He continues,

"Besides, *that article* only extended to persons who are charged with *murder* or *forgery*. Was it therefore in existence, it would not extend to mutineers or deserters. As to *these*, the expiration or continuance of that treaty cannot alter the case. The right of a government to claim *these*, must depend on other ground than the treaty. And here, before I end this essay, let me just observe, that the right to claim criminals, whether it be a perfect or an imperfect right; whether sanctioned by the law of nations, or dependent only on the *comity* of governments, yet it belongs to a *state of peace*. It is the same, though every nation in the universe were in the utmost

* In the case of Mr. *John Montgomery*, now of this state, who was demanded by the governor of *Pennsylvania* from the executive of this state, the requisition, as I understand, was rendered nugatory by a disagreement between the two governors, as to the spot, where the one should deliver and the other receive him.

harmony and good will with each other. It grows not out of a state of war. It has nothing to do with that *set of rights* or *duties*, which, in a state of war, arise and exist between the *belligerent* and the *neutral* powers."

Having thus proved that one nation cannot refuse to deliver criminals to the nation whose laws have been violated, the author proceeds to his second number, in which he endeavours to show that a neutral power, in time of war, ought to deliver to each of the belligerent powers the deserters from their respective armies or navies. This obligation results, as he contends, not merely from the principle of their being criminals, but because a refusal to do so, would be a violation of the duties of neutrality.

"The moment war takes place between two nations, all those states, which choose to be considered neutral, become *deprived* of many rights, which they enjoy in peace. I need not multiply examples: One or two will be as good as a thousand. In time of peace, any nation may send military stores to another. In time of war, a neutral nation cannot send such stores to either of the belligerent nations. In time of peace, a nation may send its vessels with provisions or necessaries to any port of any nation, which will admit them. In time of war, no nation has a right to send their vessels with provisions or necessaries, to any belligerent port which is blockaded. In time of peace, any nation *may* permit the armed force of another to march through its territory, for the purpose of establishing or relieving garrisons. In time of war, to permit this to either of the belligerent powers, would be a violation of neutrality.

"A nation, which would wish to enjoy the benefits of neutrality, ought, when war breaks out between other powers, to act *strictly impartially to both;* and not to do, or suffer to be done, as far as relates to itself or its citizens, any thing that would benefit the one to the prejudice of the other. Neutrality will not permit *an act of succour* to be given to *one* of the belligerent powers, even though the *same* is given to the *other;* because such may be the relative situation of the two, that the same act might be less beneficial to the one than to the other. Need I give an example? A city is besieged, and the garrison reduced to the last rations of provisions, while the besieging army has abundance; the neutral nation sends a large

supply of provisions to each, the city is thereby saved from the necessity of capitulation. Or, reverse the case; suppose the city to be well furnished with provisions, the invading army reduced to their last ration; the consequences of such conduct on the part of a neutral power, would be that the seige, which otherwise must have been *raised*, would be *continued*.

"Having thus stated what neutrality requires, I will now examine the particular question before us.

"When war takes place between two nations, what are the means by which one attacks and the other defends? or, in other words, by which they endeavour to terminate the dispute between them, of whatever nature that dispute may be? Surely no person will say, that these means merely consist in muskets, bayonets, swords, pistols, blunderbusses, cannon-ball, grapeshot, gunpowder, horses, ships, &c. These, of *themselves*, would be as *un*operative as the same quantity of brick dust. No; it is by the *men* who compose their armies; it is by the men who man their fleets, and by them only, that the one attacks and the other defends. It is by their hurling their powder and their ball, in thunder against each other. It is by the rushing, in the open field, with fixed bayonets, in *iron order*, upon each other. And is there a man so lost to every correct sentiment, that he will dare hazard the position, that though a neutral nation cannot legally increase to a belligerent nation the quantity of arms and ammunition, which of themselves would be perfectly harmless, yet the neutral may increase or decrease, at their pleasure, in favour of the one or the other of the belligerents, the men employed by, and sacredly bound to, the belligerent nation to use those arms and ammunition; and on whose *fidelity in that use* the safety of that belligerent nation to whom they belong, depends? Doth not every officer, every soldier, whether belonging to the army or the navy, by deserting, weaken the power in whose service he was, and render it less capable of offending its enemy and defending itself?"

In the third number he investigates the evidence of the citizenship of the deserters and shows incontestibly that not a single one of them was proved to be *American* citizens, and that two them were clearly proved not to have been entitled to that character.

In the fourth number the author exults in this detection of the falsehood of that part of the president's message which is relative to the citizenship of the seamen.

"It had been some months since I had seen the proclamation. But I now have it before me. What emotions you will feel, when you read the following extract from it, I know not, but I cannot read it without *horror:* "this enormity [the attack on the *Chesapeake*] "was not only without provocation or justifiable cause, but was "committed with the avowed purpose of taking by force from a "ship of war of the *United States* a part of her crew; *and that no "circumstances might be wanting to mark its character, it had been "previously ascertained that the seamen demanded were native citizens "of the United States.*"

In No. 5. he proves that if war should ensue from the attack on the *Chesapeake* it will be chargeable to us as the aggressors, because there was sufficient reason for the *British* fleet to consider the *Chesapeake* as acting in a hostile character.

Here the author must encounter much opposition from his readers. The pride of some, the ignorance of others, and the *amor patriæ* of all will conspire to exclude the rays of conviction. But let us hear him candidly. *Expende Hannibal.*

Neutrals are bound to observe a rigorous impartiality towards the belligerents. A nation is an aggregation of individuals, each of which is personally answerable for the actions of the body corporate, and é converso, the nation for the individuals unless the act of the latter is disavowed. Acts done by an individual in contravention of the law of nations and without the knowledge or assent of his nation, authorize the belligerent which is injured to punish him. Whatever acts, if done by an individual, would justify the treatment of him as an enemy if done by a nation, would authorize similar treatment towards it.

The territory of a nation is the district of land over which it presides. Acts committed in violation of that jurisdiction authorize war. Not only actual, but *constructive* enemies are protected while they are within that territory. This protection ceases as soon as they are on the high seas. Ships of war of a

neutral are privileged from stoppage and search on the ocean because the good faith of the nation to which they belong is pledged for their neutrality. By a violation of that neutrality they lose that exemption and are to be considered as enemies.

The application of these principles is shown in a case stated which the author introduces very appositely:

"But I will first tell you a story. Lord *Chesterfield*, who in his early life occasionally frequented the usual resorts for gaming in the metropolis of *England*, one evening standing by a table, at which were much fashionable company, his attention was attracted to a celebrated character, who passed as a foreign count, well known for his skill in manufacturing good luck. When the game was up, his lordship proposed joining the party, which, as you may be sure was readily accepted. A few minutes only had passed before *Chesterfield* perceived his antagonist palming a card, when catching up the snuffers, he struck the point of them through his hand and pinned it fast to the table, then instantly with great politeness said to him, "My dear count, if you have not a card under that hand, I will ask your pardon for what I have done." The count, agonized both by torture and disgrace, sneaked out of the room, and was never seen there again.

"You are, my fellow citizens, by this time, I doubt not, prepared to answer my question, or at least prepared for my answer to it.

"One thing is certain, the nation that wishes or expects its flag to be respected, must at least act as if she respected herself.

"The moment a nation is known to employ any of its armed vessels inconsistently with its neutrality, or permits them to act, or justifies them in acting, contrary to the duties of neutrality, that moment the neutral nation forfeits its good faith, its integrity and its honour. And for such nation afterwards to insist that respect should be paid to its flag, thus, by itself, stained, disgraced, and dishonoured would be as ridiculous and as contemptible, as should an old battered prostitute insist upon being treated with all the decency and respect due to virgin purity and innocence!"

The writer next asks "by whom and by what authority may he be so treated?" and answers by the armed vessels of the nation against whom the hostile act operates. Hence he justi-

fies the attack of admiral *Berkely*. The cogency of the arguments which have heretofore been used has appeared to me irresistible, but here I must differ with this politician. It is proved that the *Chesapeake* went to sea in such a manner as to forfeit the respect which is due to a national vessel; but to authorize the punishment of such a violation of the law of nations, there should have been a formal demand, upon our government, of reparation and an explicit approbation, by that government, of the conduct of its officers. This approbation is not to be deduced from conjectures nor inferences, more particularly from such inferences as are here drawn. The proclamation in which the inlistment of the men is sanctioned was not in existence when the attack was made: nor had the trial of *Barron* or *Gordon*, for delivering them up, been ordered. These facts were subsequent to the outrage. I grant that "the acts done by the officers must be considered as the acts of the government unless *disavowed*," but our author would invest admiral *Berkely* with the right of trying and condemning the *Chesapeake* without such previous steps. That there was a shameful violation of good faith in thus manning our fleet at the expense of *Great Britain*, there can be no doubt, but I hope the *United States* are not yet so humbled in the eyes of the world, that they are to be placed out of the ban of the law of nations and punished, by an admiral, as a common pirate!

In the 5th No. the politician proceeds to show that there was nothing so *incorrect or offensive* in the conduct of the *British* officers towards the *Chesapeake*, as could give our government just cause of complaint. This is a question not very pertinent to the subject. If you will concede to the admiral the right of taking the men in a forcible manner, I have no doubt but that it was exercised in such a manner as not to tarnish the name of a *British* soldier. Capt. *H.* was undoubtedly obliged to submit to the orders of his superior, whatever might have been his opinion of their propriety.

It is not less irrelevant to the subject and to our purpose to investigate the conduct of the committee at *Norfolk*. We cheer-

fully pay that passing tribute of applause to which the patriotism of their motives and the promptness of their measures so well entitle them.

The proclamation is examined very ably in the 7th No. and clearly proved to be inconsistent with the principles of neutrality. It was not less erroneous in us to retaliate upon the *British* nation for the misconduct of one of its inferior officers than it was in those officers to violate the dignity of our flag to punish the misconduct of one of our inferior officers. To each case we may apply the law maxim, *in pari delicto potior est conditio defendentis.*

The 8th and last letter contains an able exposition of the act of congress of 3d *March*, 1808, investing the president with power to interdict foreign vessels from entering our ports in certain circumstances.

"This law professes *only* to give powers to the president to enable him "to *prevent insults to the authority of the laws*, whereby the peace of the *United States* with foreign nations might be endangered." This law, in the words of it, has no *immediate* relation to a state of *war* between other nations, and of *neutrality* in our government. It is true it refers to *armed vessels*, but we well know that many nations in times of profound peace, keep up an *armed naval force;* and that these armed vessels are frequently employed by the nation to which they belong in voyages to, and from their remote colonies, and have frequently occasion to enter the ports and harbours of other nations, and there procure such supplies as may be wanted.

"Considering then this power to the president, as acted upon by him *in a time of peace*, could he with propriety, under the pretence that he *was apprehensive* that the authority of the laws would be insulted, and thereby the peace of the *United States* with foreign nations would be endangered—Could I say, the president of the *United States* (for the act gives *preventive* authority,) with *propriety* issue a proclamation, that *no armed vessel of any nation* should enter our ports, or even any waters within our jurisdiction? such an act, according to the law of nations, as long received and acted upon in *Europe*, would, if it did not justify hostility, cause us at least to be considered a country of barbarians and savages, for none but such

do *absolutely* exclude the entrance of the armed vessels of any a - tion with whom they are at peace.

"But could Mr. *Jefferson* under this law, at a *time when there was a general peace*, with propriety exclude all the armed vessels *of one particular nation*, leaving full privilege to the armed vessels of other nations to enter our ports or waters? In so doing he would give just cause to the nation so treated to declare war against us. So much for what he properly might do *preventively*, in time *of general peace*. Let us examine what he might do *punitively*.

"I will now suppose, that *in time of general peace*, certain armed vessels of a foreign nation, having entered our ports, or waters within the jurisdiction, have there violated our laws. In this case I admit the full authority and right of our government to *punish those who have thus acted;* it might punish them by commanding, and enforcing, if in its power, their departure. It might forbid their entrance into any other ports or waters within our jurisdiction. It might prohibit our fellow citizens from giving them aid or furnishing them with supplies; that is, provided the offence committed would, *in sound discretion*, justify such a punishment. But, I deny, that in the case I have last stated, our government would have for that cause, any right to deny the *duties of hospitality*, to any *other* armed vessels, than *those*, who had violated our laws, either by prohibiting them from entering our ports or waters, or by prohibiting our citizens from giving them such aid or assistance as they might need. Still less, if possible, could our government justify preventing, for that cause, or refusing permission to *any vessel* belonging to the same nation, or to its citizens or subjects, to make entry, and unlade, so long as the said armed vessels should remain in the harbours or waters of the *United States*, in defiance of the public authority. A nation in *time of peace* declaring itself to be in a state of peace, has no more right to punish the *innocent* for the crimes of those who are guilty, than a private individual in society has, because he has received an injury from B, to make a victim of some one of the family, or his connexions, who was not privy to, nor concerned in the crime. No casuistry, no sophistry can darken this truth.

"A government which in time of peace receives an injury from the citizens of another nation may, if in its power, punish the citizens according to the nature of their offence, and if the offenders escape and thereby avoid punishment, the government injured may

apply to the sovereigns or supreme authority of the nation, whose subjects had committed the injury, and demand redress; if this redress is granted, there terminates the dispute; but if the persons complained of are justified, if redress is refused, then that government, which received the injury, hath a right, as prudence or policy may dictate to declare war, or as a milder remedy to grant letters of marque or reprisal. And until war is declared, or at least until letters of marque or reprisal are granted, which is, an *hostile* measure, no government has a right, in any manner, to visit, upon the innocent the sins of another, nor can the sins of a *portion* of its citizens, be visited upon its government, until a fair candid application has been made, and the conduct of the offender is justified or redress refused.

"I have thus far considered this subject, to wit, the act of congress and the president's authority under it, upon the supposition the whole world, or what is the same thing, all nations, with whom we have any connexion, *to be at peace.*

"I will now consider the act of congress as an act having passed *during the war*, that subsists between the powers of *Europe*, and *at a time* when we professed ourselves a neutral nation. In this situation, as we were at peace with all the belligerents, and were neutral in their disputes, we not only owed to each of them every thing due to them as being at peace with us, as far as consistent with a state of neutrality; but we were also bound to perform to each all *the duties of neutrality* in the *most honourable and impartial manner.*

"The duties of neutrality depend solely upon the laws of nations (except so far as they may be regulated by treaties) they *cannot* be regulated by the *municipal laws of any country;* the *American* government cannot by any of its acts either *increase*, *diminish* or *alter* the duties which it owes as a neutral nation to either of the belligerents; such an act, if passed, would be in violation of the constitution; it would be a nullity.

"I have already shown, that if *all nations were at peace*, the proclamation of the president could not be justified as a *peace measure* but would be an *act of hostility.* Yet *less* can it be supported as the act of a government professing itself to be neutral between the belligerent powers, and sacredly bound to act to each with equal impartiality, and to do no act, which in its own nature should benefit the one of the belligerents, as such, to the injury of the other. I have

in my last number shown how inconsistent the conduct which our government hath adopted is with the duties of neutrality, and how immediately it operates in favour of *France* and to the injury of *Great Britain*, as it immediately relates to the war subsisting between them. I have shown that the proclamation could not be justified by the laws of nations nor by the laws of neutrality. And I have shown that it cannot be justified by the acts of congress, because an act of congress cannot change or alter the duties, which a neutral owes to belligerents, as those duties in no degree depend upon the municipal laws of any country.

"If then the conduct which our executive has adopted in publishing and enforcing the proclamation is not on our part consistent with a state of general peace, nor with the state of neutrality towards the belligerent powers, it can *only* be considered as an *hostile* act, and *such* it *notoriously must be allowed:* I have already proved that a nation cannot visit the sins of the guilty upon those who are *personally unoffending*, except when the nation *acts hostilely:* in that case having a right to *punish the government* against which hostilities are commenced, as a *corporate or political body*, so as it has a right to inflict punishment upon *every of the members*, of which that corporeal or political body is composed; just as when an individual, in his private character, beats another, although the blow was given with the *fist*, the person injured has a right to retaliate on the *ribs*, the *legs*, even the *toes* of the aggressor.

"But here the effect of the proclamation is not merely to injure the *innocent crews* of the *British* ships, thus *occluded;* which would of itself be bad enough; but the principal injury is done and was intended to be done to the *British* nation, *as a nation*. Hence then it is manifest that our executive has acted in violation of the pacific duties; he has acted inconsistent with neutral duties; he has acted in a *hostile manner* towards *Great Britain;* he has *pursued measures of hostility towards that nation!*

"But by what right has the president done this? Is he authorized so to do by the constitution? No, by the constitution *congress alone* have the *power of declaring war*. If congress alone can declare war, can the president before congress have made that declaration, *himself* act *hostilely* towards, or in other words commit *acts of hostility* against any nation? The question is almost an insult to common sense; as well might the constitution have authorized the president to declare war; if under its authority and consistent therewith, he

may commit acts of hostility against a nation, by which that nation would be justified in retaliating, and thus engage his country in a *solemn war.*

"Is he *justifiable* under the law of congress, on which I have observed, to do acts *hostile to a foreign nation?* No, an act of congress, under the *pretext* of preventing the violation of our laws, or under any other pretext, cannot infringe the laws of nations, the laws of neutrality, nor justify the president in committing any act of hostility. The law question is therefore, as far as it may have such effect a *mere nullity, a direct violation of the constitution.* But it may be asked, how comes it that *such an act* ever disgraced our national code? I will, my fellow citizens, give you its history: an advantage was taken at a period when the "*sensibilities*" of the citizens of the *United States* were *all alive*, and that too the effect of art and cunning, and when their *prudence and good sense* were as fast *asleep* as if they had been under the influence of some one of the *ancient necromancers.* The members of your national legislature *passively passed* it, just as they, at the last session, passed the embargo law, because the president *willed it.*"

The style of the pamphlet is rugged and unpolished, but the importance of the subject and the solidity of the reasoning entitle it to a careful consideration.

THE ADVERSARIA.

No. I.

"He hath been at a feast [of books] and stolen away scraps." *Shakspeare.*

THE witty *Balsac* informs his readers, that in a valley near the *Pyreneans*, two leagues broad and five long, the inhabitants had lived, from time immemorial, in the most cordial friendship, when their ill fortune brought an *attorney* to live among them. These people who had never known what a lawsuit meant, before this unlucky arrival, immediately fell together by the ears; nothing was heard of but processes and appeals to the parliament of *Thoulouse.*

When they had thus torn each other to pieces, and *spent all their money*, they began to consider what was the cause of this wonderful change. They unanimously agreed that it must be ascribed to the poor attorney, and, regarding him as the source of all their misfortunes, they rose, drove the harpy out of the country, and the pristine tranquillity of the valley was entirely restored.

I have been diverted at observing a precaution in the *English* laws, against the increase of this body of men; and one expression in an old statute proves that the honest *Pyreneans* were not the only sufferers by my unfortunate profession. In the thirty-third year of the sixth *Henry*, an act of parliament was passed, which states that not long before that period, there had not been more than six or seven attorneys in *Norfolk* and *Suffolk*, in which time, it recites, great tranquillity prevailed, (*quo tempore, magna tranquillitas regnabat*) but that the number had increased to twenty-four, to the great vexation and prejudice of the king's liege subjects in those parts. It concludes by restricting the number, in *Norfolk*, to six, the same number is allowed to *Suffolk* and two to the city of *Norwich*. As I believe this curious law was never repealed, I should like to ascertain how it was originally evaded by the cunning of my brethren.

LORD CHANCELLOR HATTON.—During a cause in which the boundaries of a tract of land were to be ascertained, the counsel of the one party stated "we lie on *this* side, my lord," and his opponent "and we lie on *this* side." The chancellor interrupting them, said, "if you *lie* on both sides, whom will you have me to believe?"

SIR HARBOTTLE GRIMSTON.—A curious instance of the quaint style of the last century occurs in the preface to *Croke Elizabeth*. Sir *Harbottle Grimston*, the editor and enthusiastic admirer of the author of these valuable reports informs us that sir *George Croke* was continued in his office of judge of the king's bench after he became old and deaf by *Charles* II. who

"gave him the like allowance and fee he paid to the rest of the judges, till a *certiorari* came from the great Judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory."

LORD MANSFIELD.—*Foote* was acquitted from a certain charge preferred against him by the instigation of the dutchess of *Kingston*, by proving an *alibi*. When the trial was concluded and the perjury evident, lord *Mansfield* observed, "this is a very providential alibi; it has baffled the most infamous conspiracy that was ever set on *foot*."

The numerous folios which were published at an early period of *English* literature, abound with genuine strokes of humour or sketches of a character, at once amusing and instructive to a curious reader. The writers of that day did not aspire to the ambitious verbiage which distinguishes and weakens the language of our age; and they disdained the glittering tinsel of superfluous ornament. *In homely strains devoid of art*, they expressed plain truths in nervous and lucid terms.

Such a writer is the honourable *Roger North*, esquire, who, in the reign of the second *James* "undertook to become a life-writer, and as such to dress up his remembrances of three honourable brothers and friends, the late lord-keeper *North*, sir *Dudley North*, and Dr. *John North*." This venerable volume abounds with minute anecdotes of the most celebrated lawyers and judges who flourished about the time that the baron of *Guilford* was keeper of the great seal, which office he held under *Charles* II. and *James* II. The biographer has endeavoured, as he informs us, "to rectify want of art by copia of matter, and that, upon honour, punctually true."

The editor expects to obtain a copy of this scarce volume, for the purpose of inserting an abridgment of it in the *Law Journal*.

LITERARY INTELLIGENCE.

A NEW EDITION OF THE LAWS OF MARYLAND.

To be prepared for the press by Virgil Maxcy, attorney at law.

THE length of time which has elapsed since the last edition of the laws of Maryland, has rendered a new one necessary. Since the year 1800, the acts passed at each session have been published separately, without any index. This inconvenience, as well as the great expense of a complete set of the laws, as they are now published, has been much complained of. This expense arises principally from the unnecessary publication of the private acts. The laws not of a general nature and the titles of such as have expired or been repealed occupy more than two thirds of Kilty's edition. It is but very seldom that gentlemen of the bar, even in the most extensive practice, have occasion to recur to private acts of assembly. The possession of them is wholly unnecessary also to justices of the peace, as well as to those who, not being professional men, or in office, are yet desirous of obtaining a competent knowledge of the laws of their own state. This extraordinary expense, which has prevented all persons from purchasing the laws, except lawyers and magistrates who are obliged to have them, may be removed by a separate publication of the public acts. This plan has been adopted in most of the other states, and its manifest utility renders it matter of surprise, that it has never been followed in Maryland, where the laws have become very voluminous.

This edition of the laws, therefore will contain those acts only which are of a *public* and *general* nature. *Private* acts will be totally excluded; as well as those of mere local operation; except some few, which will be inserted on account of their peculiar importance. The last volume will contain a copious *index*, which will answer the purpose of a digest. So that an edition of the laws, upon the plan proposed, will possess the double advantage of giving *at large* the public acts now in force, (which of course will be authority in the courts) and of a compendious collection, under appropriate heads, of all the principal matters, for the information of those who do not wish to acquire the minute knowledge requisite for a lawyer.

This edition will be printed in two large volumes, royal octavo, at six dollars the volume, payable on delivery.

A TRANSLATION of *Pothier's* celebrated Treatise on Insurance on Bottomry and Respondentia, and on the hiring of Sailors is now preparing for the press and will be published speedily. Each treatise will be accompanied by notes from the pen of a professional gentleman, referring to *English* and *American* cases on the different points treated of by *Pothier*. An appendix of useful forms will be subjoined, and the whole adapted to the use of the counting-house, as well as the library of the lawyer.

A translation of the treatises of the same author on Averages and Charter Parties is in a state of forwardness.

In the press and will speedily be published,

BY I. RILEY.

SHEPPARD'S TOUCHSTONE, 2 *vols. royal* 8vo. *printed page for page from the last London edition.*

To this edition will be added all the statutes of the several states relating to the subjects discussed in that work, together with the statutes of each state in the union on the following heads, viz.

1. Statutes regulating the levying of Fines, and suffering Common Recoveries.
2. Statutes relative to Deeds, and the manner of recording the same.
3. Statutes with reference to Deeds made to defraud creditors.
4. Statutes as to Warranties, lineal or collateral, and their binding effects.
5. Statutes relative to Feoffments.
6. Statutes relative to Attornments.
7. Statutes relative to Leases.
8. Statutes regulating last Wills and Testaments.
9. Statutes regulating Uses.

Edited by *John Anthon*, esq. counsellor at law.

NOY'S MAXIMS, 1 *vol.* 12*mo*, *printed from the last London edition.*

ESPINASSE'S DIGEST of the Laws of Actions, and trials at Nisi prius, 2 vols. 8vo.

CASES argued and determined in the Supreme Court of Judicature of the state of New-York, from January term, 1799, to

January term, 1803, both inclusive, together with cases in the Court of Errors. By *William Johnson*, counsellor at law.

Many of the cases during this period have been collected and arranged, with a view to publication, by *Jacob Radcliff*, esq. late one of the judges of the supreme court, from whom they have been obtained by the present reporter.

Preparing for the press, by I. Riley.

A TREATISE on Bills of Exchange and Promissory Notes, by *George Caines*, esq.

REPORTS of cases argued and determined at Nisi Prius, in the city of New-York, by *John Anthon*, esq.

JACOB'S LAW DICTIONARY, improved, in 5 *vols. royal* 8*vo.*

DIGEST of the Laws of the State of New-York, 1 *vol. royal* 8*vo.*

DIGEST of all the American Reporters.

DAY'S REPORTS, in the Supreme Court of Errors and Circuit Court of the United States, for the district of Connecticut.

By Hopkins and Earle of Philadelphia.

A System of Exchange Operations between the principal places of Europe.

Containing the names and divisions of the different Moneys of Exchange, and their relative value;

The Usances of Bills of Exchange according to the customs of places upon which they are drawn;

The times of Grace, Payment, Protest and other Exchange regulations, as respectively established;

The course of Exchanges between relative places in Europe;

The manner in which their respective accounts are kept, and the method of reducing Bank to Current Money according to the existing agio;

With a reciprocal reduction of the different Moneys, calculated upon the order of Exchange, &c.

In the manner of the French system of *Joseph René Ruellee;* by *Peter Kuhn* jun. esq. late Consul of the United States of America near the Republic of Liguria.

TO WHICH IS ADDED,

The Weights, Qualities and names of all current Coins, Foreign and Ancient, and their valuation in the currency of France, from the authentic Assays of *M. Morcé De Richbourg;* together with their deduction to the Weights and Currency of the United States, according to the estimates of Foreign Coins, established by act of Congress.

NEW PUBLICATIONS.

Thoughts upon the conduct of our Administration, in relation both to Great Britain and France, more especially in reference to the late negotiation, concerning the attack on the Chesapeake. By a *Friend to Peace.* Boston. 20 cents.

REPORTS of cases argued and adjudged in the Court of King's Bench during the time of lord *Mansfield's* presiding in that court; from Michaelmas term 30 Geo. 2. 1756. to Easter term 12 Geo. 3. 1772. in 5 *vols.* By sir *James Burrow Knt.* Late Master of the Crown Office, and one of the benchers of the honourable society of the Inner Temple. First American from the fourth London edition, corrected. With the addition of marginal notes, and many new references to later British and American decisions, by the American editors. William P. Farrand and Co. Philadelphia, 22 dols.

BRITAIN independent of Commerce, or proofs deduced from an investigation into the true causes of the Wealth of Nations, that our riches, prosperity and power are derived from sources inherent in ourselves, and would not be affected, even though our Commerce were annihilated. By *William Spence, F. R. S.* Bradford and Inskeep, Philadelphia. 50 cts.

Just Published [at New Orleans] and for sale by the Author, price one dollar.

A PAMPHLET containing a letter to his excellency William C. C. Claiborne, governor of the territory of Orleans.

A letter of thanks to James Brown, esq. counsellor at law.

A defence of the honourable John Rowan and Daniel Clark, members of congress, against the slanders of the Tergiversant Redacteur of the Courier.

A letter to Messrs. Judson, Hickly, Waters, Hill, Sanderson, Clark and Richardson, the gentlemen who composed the Jury, &c.

A letter to the honourable Joshua Lewis, one of the judges of the superior court.

Hints for the consideration of grand and petit juries.

By *H. P. Nugent.*

N. B. This pamphlet is likewise for sale at Mr. Muspero's print-store, Public Square south, No. 13, and at Mr. Renard's printing office.

INSOLVENTS.

A list of persons who have applied to Baltimore County Court for, and who have obtained a final discharge under the Insolvent Laws of this State, since the 1st day of January, 1805.

Persons' Names. When released.

A

Askew Campbell S. 8th August, 1807.

B

Brown Thomas, 1st April, 1805.
Bull Josias S. 18th April.
Brown Henry, 25th April.
Bolgiano Francis W. 18th July.
Barroux Michael, 18th July.
Barbarine Louis, 31st July, 1806.
Bacon James, 8th November.
Buchanan George, 23d March, 1807.
Buchanan Andrew, 10th Oct.
Barron Jno. 7th Nov.
Butler David, 14th Nov. 1807.
Baxley Jno. 16th April, 1808.

C

Churchman Enoch, 12th April, 1805.
Cooke Robert, and Walter Wilson, 15th April.
Cooke Casper, 15th April.
Conner Daniel, 29th April.
Cave Thomas, 27th May.
Cantwell Thomas, 26th July.
Coulter Alexr. 27th August.
Cooper James, and Jno. Odell, 3d Nov. 1806.
Clarke Joseph, 23d April, 1808.
Cumming John, 12th May, 1807.
Caldwell Jno. R. 10th Oct.

D

Davis Charles, 29th April, 1805.
Davidson Alex. 9th Nov.
De Neroth Lewis, 1st August, 1806. *Person released*
De Valcourt Alexr. 2d April, 1808.
Driggs Nathl. 14th May.

E

Edwards John, 16th April, 1805.
Edwards Chs. 29th Nov. 1806.

F

Freize Simon, 10th Oct. 1807.
Fry James, 2d April, 1808.

G

Gittings Richard, 24th May, 1806.
Gill John, 31st July.
Ghequiere Charles and Henry Kunckle } 10th Oct. 1807.
Gade Jno. 16th April, 1808.

H

Houzlet Peter, 2d Sept. 1805.
Harris William, 21st May, 1806.
Hencks Joseph, 3d Nov.
Higginbothom Thomas and Jno. 13th Oct. 1807.
Hawkins and Claggett, 7th Nov.
Hay John, 28th May, 1808.

J

Johnson Washington, 16th April, 1805.

K

Kerr Thos. 10th Oct. 1806.
Kenter Chas. F. 7th Oct. 1807. } *Person released*

L

Larew James, 16th April, 1805.
Lowry John, 20th April.
Luttig John C. 2d Oct.
Loudenslarger Jacob, 3d Nov. 1806.
Larrabee Danl. 2d April, 1808.
Lamb John, 2d April.
Langford Charles, 16th April.

M

Myers Joseph, 17th April, 1805.
M'Evo y James, 20th Aug. 1805.
M'Creery Ralph, 25th Nov.
Merryman John, jun. 31st July, 1806.
Muschett Walter, 7th Oct.
Medcalf Abm. 23d March, 1807.
Miller John, 1st June.
Meeteer Thomas, 10th Oct.
Mackey Michael, 7th May, 1808.

N

Neale John, 4th April, 1807.

O

Ottesen Jacob, 7th May, 1808.

P

Price Howell, 7th Oct. 1806.
Pierpoint Joseph, 27th October, 1807.

R

Ruff Danl. 29th April, 1805.
Randall Christr. 23d May.
Roach Joseph, 3d July.
Roger Andw. L. 23d March, 1807.
Richardson Robt. R. 16th April, 1808.
Rutter Valentine, 23d April.

S

Searight James, 31st July, 1806. *Person released.*
Sweeney Richd. 31st July.
Sitler Jacob, 8th October. *Person released.*
Seton Jno. Curson, 7th October 1806.
Starr Wm. 29th Nov.
Sitler Danl. 10th Oct. 1807. *Person released.*
Suman Wm. 2d April, 1808.
Smith Joseph P. 9th April.

Sayer Jno. B. 9th April, 1808.
Stickney Jno. 14th May.
Spalding Stanislaus, 2d April.

T

Thompson John and James, 10th Oct. 1807.
Tagart Jno. and Thos. Caldwell, 23d April, 1808.

V

Vonhemison Andw. Jacob, 23d April, 1805.

W

Walker Saml. 16th April, 1805.
West James, 7th May, 1808.
Wilmer Simon, 28th May.

Y

Young Chas. B. 5th Dec. 1807.

Published by order of the court.

Wm. GIBSON, Clk.

23d July, 1808.

A list of persons who since the first day of January, 1805, have applied to Baltimore County Court for the benefit of the Insolvent Laws of this state, but who have not received their final discharges, and whose time for final hearing is passed.

Names. *Time for final hearing.*

A

Adrian George, 14th Aug. 1805.
Arnold Benj. 1st Jan. 1806.
Andrews James, 2d May, 1807.

B

Boyce Wm. 30th July, 1806.
Brown John, 7th October.
Barnes James, do.
Beck John G. 10th Oct. 1807.
Bouldon Jacob, do.
Brown Henry, 14th May, 1808.

C

Chalmers James, 3d April, 1805.
Clarke John, 15th May.
Culverwell Stephen, 10th Sep. 1805.
Crain Thos. 1st Oct. 1805.
Chenoweth Samuel, 7th October, 1806.
Childs Benj. 1st June, 1808.

D

Dutton Benj. 2d Sept. 1806.
Doyne Robt. 7th October.
Davis John, 10th September.

E

Erengy James, 7th Oct.

F

Forbes John, 29th May, 1805.

G

Graham Hamilton, 10th May.
Goodwin Samuel, 15th July.
Greenfield Thomas, 11th May, 1807.

H

Harper John, 24th July, 1805.
Haslem John, 14th August.
Harrison Thos. 19th August.

Hobby John, 17th Oct. 1805.
Hunt Walter S. 2d April, 1808.

J

Irven James, 14th August, 1805.
Johnston Horatio, 10th September, 1806.
Jones Thomas, 7th Oct.
Judge Thomas L. 3d Nov.
Jaffray James, 10th Oct. 1807.

K

Kidder Joseph, 3d Nov. 1806.
Keighter Daniel, 2d April, 1808.

L

Lambden Thos. 22d July, 1805.
Lutze George, 31st July, 1806.
Lamerlere Anthony, 14th Aug. 1805.
Lancaster Moses P. 10th Oct. 1807.
Legg William, 28th May, 1808.
Leatherwood Jesse, 10th Oct. 1807.

M

Maidwell James and Alexr. 7th Oct. 1805.
Mathews Wm. P. 14th Nov.
Morgan James, 1st Jan. 1806.
Maxwell George, do.
Mottee Francis, 7th Oct.
Mulligan Patrick, 28th March, 1807.
Morneweck Charles, 10th Oct.
Mattison James, do.
M'Henry Dennis, do.
Mordecai Issac, 7th Nov. 1807.

N O P

Perse Fordon, 14th May, 1805.
Pevigoy Joseph, 23d Sep.

R

Rhodes Benj. 18th Nov.
Rogers Charles, 31st July, 1806.
Rich Matthias, 7th May, 1808.
Randall Thomas B. 4th June.
Robinson William 9th June.

S

Stansbury Elisha, 15th October, 1805.
Smith Isaac, 10th Nov. 1806.
Stenhouse, 31st July.
Semmer Henry, do.
Stewart Peter, 10th Nov.
Smith Jacob G. 9th May, 1807.
Sands Hugh, 10th October.
Slater William, 19th October.
Sinners Elijah R. do.
Sanderson Francis, do.
Schriver John, H. 14th October, 1807.
Sackrider Daniel W. 14th Nov.
Suman William 2d April, 1808.
Smith Charles, do.

T

Travers Fredk. 1st Jan. 1806.
Tucker Benjn. 9th May, 1807.

U & V

Vaughan Thomas N. 14th Aug. 1805.
Vaughan Benj. 15th October.
Vaughan Abm. 3d Nov. 1804.
Usher Abm 4th Nov. 1807.
Veazy John, 2d April, 1808.

W

Woods Joseph, July, 1805.
Walsh Michael, 31st July, 1806.
Willey William, 4th June, 1808.

Y

Young John, 10th Oct. 1806.

Published by order of the Court,
Wm. GIBSON, clerk.
August, 4th 1808.